Supreme Court, U.S.
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No. 00-_____

IN THE

Supreme Court of the United States

UNITED AIRLINES, INC.,
Petitioner,

v.

LESLIE FRANK, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal court may refuse to enforce a judgment in a prior federal class action, properly certified under Rule 23, either (a) because the prior class action did not permit class members to opt out of the class (a question that this Court has granted several times but never answered); or (b) by relying on a subsequent change in the facts underlying the judgment, but without any consideration whether the change was significant or material to the plaintiff class's claim, in direct conflict with *Montana v. United States*, 440 U.S. 147 (1979), and numerous decisions of the courts of appeals.

2. Whether a claim for disparate impact is cognizable under the Age Discrimination in Employment Act ("ADEA"), as the Ninth Circuit held below, or whether the ADEA does not recognize such claims, as other circuits, following *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), have held.

PARTIES AND CORPORATE DISCLOSURE

Petitioner is United Airlines, Inc., defendant-appellee below. UAL Corporation, a publicly traded corporation, owns 100 percent of United Airlines, Inc.

Respondents in this case were plaintiffs-appellants in the court below. They are Leslie Frank, Pat Parnell, Susan Broderick, Carole Kirk, Nichkol Melanson, Sandra Huff, Diane Davis, Sharon Benjamin, Sharron K. Taylor, Bland Lane, Joan Balla Weaver, Donna Durkin, and Ellen McCormick, individually and as class representatives.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner United Airlines, Inc. ("United"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. 2000).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in this case is reported at 216 F.3d 845 (9th Cir. 2000), and reprinted in the Appendix to this Petition ("App.") at 1a. The opinions of the United States District Court (Legge, J.) are unreported and reprinted at App. 37a.

The opinions of the United States District Court (Pratt, J.) in the prior class action judgment are reported at *ALPA v. United Airlines, Inc.*, 26 Fair Empl. Prac. Cas. (BNA) 607 (E.D.N.Y. 1979), and *ALPA v. United Airlines, Inc.*, 26 Fair Empl. Prac. Cas. (BNA) 622 (E.D.N.Y. 1979), and reprinted at App. 71a and 86a.

JURISDICTION

The panel opinion of the Court of Appeals was issued on June 21, 2000. A timely petition for rehearing and rehearing en banc was denied on August 11, 2000. App. 127a. On October 20, 2000, Justice O'Connor granted petitioner an extension until December 9, 2000, to file this petition. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the Constitution provides that

[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

The Age Discrimination in Employment Act is codified at 29 U.S.C. §§ 621-634, and is reprinted at App. 128a.

Rule 23 of the Federal Rules of Civil Procedure is reprinted at App. 160a.

STATEMENT OF THE CASE

A. Prior Litigation and Judgment in the New York District Court.

From the early 1970s until July 1994, United maintained a weight program for its flight attendants. The program used separate weight charts for males and females that were independently developed and modified over time. App. 2a-3a. Until 1977, the charts were derived in part from a table of desirable heights and weights based on mortality data published by the Metropolitan Life Insurance Company. App. 102a. In 1977, United revised its female charts upward, based on data provided by the United States Department of Health, Education, and Welfare. App. 102a-103a. Other than a two-pound, across-the-board increase and further increases based upon age, identical for men and women, the charts remained the same from 1977 until United ended the program in 1994.

In 1973, the predecessor to the Association of Flight Attendants ("AFA") and several named class representatives filed a class action in the Eastern District of New York against United on behalf of "all present and future female [United] flight attendants." AFA alleged that United violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e ("Title VII") by using separate weight charts that were not comparable in their treatment of men and women. AFA also contended that United applied and enforced its weight program in a manner that discriminated against female flight attendants. AFA sought declaratory and injunctive relief, including backpay.

On November 1, 1977, the district court (Pratt, J.) certified the class under Rule 23(b)(2) of the Federal Rules of Civil Procedure, App. 88a, which authorizes class actions when the conduct at issue is "generally applicable" to the proposed class and declaratory or injunctive relief is appropriate "for the class as a whole."[1] Rule 23(b)(2) class actions are "mandatory" in that they do not afford an opportunity for class members to opt out of the action; nor does Rule 23 require that notice detailing a class member's rights be given to 23(b)(2) class members. Nevertheless, AFA and United stipulated in 1977 that class members who currently worked for United would receive written notice of the litigation in their United mailboxes, and former United flight attendants would receive notice via regular mail sent to their last known addresses. This notice described the complaint, provided the name and address of the class's legal counsel, and informed the class members that they could intervene in the litigation with their own counsel if they so wished. App. 165a.[2]

On June 12, 1979, the district court issued an opinion deciding the merits of that case. The court rejected the plaintiffs' claim that United's separate weight charts were facially invalid, and ruled that the differences in allowable weights for male and female flight attendants – differences identical to those in effect through 1994 – were permissible. *ALPA v. United Airlines, Inc.*, 26 Fair Empl. Prac. Cas. (BNA) 607,

[1] Under Title VII, back pay has generally been treated as equitable relief rather than monetary damages. *See* 42 U.S.C. § 2000(e)(5) (1994); *Local No. 391 v. Terry*, 494 U.S. 558, 571-72 (1990); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415-18 (1975). Accordingly, there is no question as to the propriety of certifying the class under Rule 23(b)(2). *See* Herbert Newberg & Alba Conte, *Newberg on Class Actions* §§ 4.14, 4-47 to -48 (3d ed. 1992) ("It is now accepted that back pay relief may be ordered for class members in Rule 23(b)(2) employment discrimination class actions . . . .").

[2] Class members received the same notice as part of the subsequent California litigation. The notice appears at App. 166a.

617-20 (E.D.N.Y. 1979) ("*ALPA*"). App. 113a-118a. The district court was aware of the Metropolitan Life Insurance tables that had, until 1977, been part of the basis for United's weight allowances. App. 102a. But experts for both AFA and United relied instead on statistics from a different source, a Health Examination Survey conducted by the United States Public Health Service ("HES study"). App. 111a-112a. The district court found that the appropriate point of comparison was not statistics for the general population, but those for the "relevant labor market." App. 116a-117a. Within that group, the district court found, figures from the HES study showed no meaningful difference between the percentage of men and women who could meet United's pre-1977 standards; the court also found that a *larger* percentage of women than men would be able to qualify under the standards in effect from 1977 until 1994. *Id.* On the plaintiffs' second claim, the court ruled against United, holding that United had enforced its weight program in a discriminatory manner. App. 118a-125a.

On October 30, 1979, the court issued a judgment and permanent injunction in accord with its opinion. United was "free to continue using" its separate male and female weight charts, which the court had found consistent with Title VII. App. 76a. At the same time, United was required to alter its weight program policies to eliminate discrimination in enforcement. App. 84a.

B. Compliance with the Judgment.

Pursuant to the *ALPA* judgment, United and AFA agreed to a revised enforcement policy that removed all subjective discretion from United's enforcement of its weight program. App. 60a. At AFA's request, United also agreed to increase its weight limits by two pounds for both men and women, and to provide all flight attendants three additional pounds at ages 35, 45, and 55. Declaration of Judith Hart, Ninth Cir-

cuit Excerpt of Record 299. Though these alterations were submitted to the court, no ruling on the revised policy was sought. Both parties agreed not to appeal those aspects of the *ALPA* decision unfavorable to them. App. 61a. On February 1, 1980, the revised program went into effect. App. 58a.

C. Re-Litigation in the California District Court.

In 1992, respondents filed the present action in the Northern District of California. Attacking the same program adjudicated in *ALPA*, they claimed that United's separate weight charts for men and women were facially invalid under Title VII. Respondents also alleged that the weight program had a disproportionate impact on older flight attendants and thus violated the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 ("ADEA"). Respondents sought declaratory and injunctive relief, as well as monetary damages, on behalf of all flight attendants employed by United after 1989. United eliminated its weight program altogether in 1994 and reinstated the handful of flight attendants who had been terminated under the program, leaving only a possible back pay and damages remedy. The district court (Legge, J.) certified the class under Rule 23(b)(3) of the Federal Rules of Civil Procedure. As required for a Rule 23(b)(3) class, and unlike a "mandatory" Rule 23(b)(2) class, potential class members were given the opportunity to opt out of the class.[3]

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[3] Respondents also alleged that United's policy violated the ADEA under a disparate treatment theory, violated the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 ("ADA"), and violated state law. Respondents' ADEA disparate treatment claims and ADA claims were rejected by the Ninth Circuit and are not relevant to this petition. Because the state-law claims "rise or fall with plaintiffs' federal claims," see App. 6a n.3, a decision by this Court to reverse and remand on any of the federal claims would necessarily require the Ninth Circuit to reverse the corresponding state-law claims.

The district court rejected respondents' Title VII claim on preclusion grounds. Because the *ALPA* litigation "necessarily decided that the differences in the weight schedules between men and women did not violate Title VII," the court held, respondents could not litigate that claim for a second time. App. 61a. The district court found that United's slight equivalent increases to male and female charts, made at AFA's request, were favorable to the class and did not render *res judicata* inapplicable. *Id.* Finally, the court rejected respondents' argument that *res judicata* should not apply because flight attendants hired after the *ALPA* litigation wished to challenge a "continuing violation." Because the class certified in *ALPA* included not only present but also *future* flight attendants, the court concluded, post-*ALPA* employees were bound by the judgment as "future members of the class defined in [*ALPA*]." App. 63a.

The district court also rejected respondents' ADEA claim, holding that disparate impact claims were not cognizable under the ADEA. The court relied on the Tenth Circuit's decision in *Ellis v. United Airlines, Inc.*, 73 F.3d 999 (10th Cir. 1996), upholding the same weight program at issue in this case, and on *Ellis*'s analysis of *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), in which this Court left a "strong impression" that the ADEA does not permit disparate impact claims. App. 55a; *Ellis*, 73 F.3d at 1009.

D. The Ninth Circuit Decision.

1. A divided panel of the Ninth Circuit reversed on both counts. In an opinion written by Judge William Fletcher and joined by Judge Reinhardt, the court held that the 1979 *ALPA* judgment in favor of United did not preclude the current litigation. The core of the majority's reasoning was as follows: Class actions seeking monetary damages – the only relief available after United eliminated its weight program in 1994 – are certified under Rule 23(b)(3), which requires in-

dividualized notice and an opportunity to opt out of the litigation. The *ALPA* class, on the other hand, was certified as a so-called "injunction class" under Rule 23(b)(2), which does not require the same notice or the right to opt out. Any difference in notice requirements was not dispositive; the Ninth Circuit expressly declined to rely on any difference because it could not determine on the record before it whether the *ALPA* notice "was distributed to all class members who would have been entitled to notice of a Rule 23(b)(3) class action." App. 10a-11a. But the difference as to opt-out rights was critical. Because the *ALPA* judgment was entered in a 23(b)(2) action in which class members were not afforded an opt-out right, the panel held, the *ALPA* judgment could not preclude the same class members from bringing a subsequent claim for money damages. App. 11a.

The panel majority offered what were ostensibly two additional reasons why the *ALPA* judgment lacked preclusive effect. First, respondents were asserting Title VII claims based on alleged violations arising after 1980, the court reasoned, and the *ALPA* judgment, entered in 1979, could not "preclude claims based on events occurring after that date." App. 9a. Second, because United revised its program pursuant to the *ALPA* judgment, slightly increasing the allowable weights equally for men and women, the two suits did "not arise from the 'same transactional nucleus of facts,'" rendering preclusion inoperative. App. 10a.[4]

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[4] The court also held that United could not rely on what it described as the *ALPA* "settlement," as opposed to the judgment, to preclude the current litigation – thus rejecting a position that United had never advanced. This was so, the court held, because the district court in *ALPA* had never approved of a settlement under Rule 23(e), and because the so-called settlement "appear[ed] not to protect the interests" of the plaintiff class in this action. App. 11a. Because United is not, in fact, relying in this case on the preclusive effect of any settlement, this petition does not address the Ninth Circuit's discussion of this point.

Having held that the *ALPA* judgment did not preclude litigation of respondents' Title VII claim, the majority went on to reach the merits of that claim. The panel majority relied exclusively on a comparison between United's weight standards and data provided by the 1953 Metropolitan Life Insurance mortality tables, notwithstanding Judge Pratt's determination in *ALPA* – based on expert testimony – that any such comparison is inapposite. On that ground, the majority concluded that United's separate weight tables were facially invalid under Title VII, and entered summary judgment in favor of the class for the alleged Title VII violations. App. 14a-19a.

As for respondents' ADEA claim, the court acknowledged the Tenth Circuit's holding in *Ellis*, as well as this Court's decision in *Hazen Paper*. The court held, however, that the Ninth Circuit had "squarely decided" that the ADEA does recognize disparate impact claims in *Arnett v. California Public Employees Retirement System*, 179 F.3d 690, 696 (9th Cir. 1999), *vacated and remanded on other grounds*, ___ U.S. ___, 120 S. Ct. 631 (2000). App. 19a-20a. The court saw "no reason to depart" from *Arnett* despite the fact that this Court had vacated the decision. The Ninth Circuit reaffirmed *Arnett*'s holding "that a disparate impact claim is cognizable under the ADEA," and reversed the district court's ADEA ruling. App. 20a.

2. In a comprehensive dissent, Judge O'Scannlain characterized the panel's decision as "conflict[ing] fundamentally with preclusion doctrine." App. 23a. The dissent rejected the majority's position that a mandatory Rule 23(b)(2) class action cannot preclude a subsequent damages class action challenging the very same policy, and cited the decisions of other courts of appeals that "recognized that a judgment entered against a class certified under Rule 23(b)(2) may satisfy the demands of due process and bind the members of that class as though it had been certified under Rule

23(b)(3)." App. 28a. Because respondents had failed to show any violation of due process in this case, Judge O'Scannlain concluded, they should be bound by the prior judgment. App. 30a-32a.

Nor, according to Judge O'Scannlain, was it relevant that United had liberalized its weight standards after the *ALPA* litigation, for only a change in "material operative facts" can prevent *res judicata* from attaching. App. 25a-26a. And United's revisions to its policy, which were *favorable* to the class and increased weight allowances by the same number of pounds for both men and women, were entirely immaterial to respondents' legal claim. "The lockstep increases in maximum permissible weights, in short, are no more material to the plaintiffs' cause of action than the possibility that the new policy was printed and circulated on a different color of paper." *Id.* On this point, the dissent noted, the Ninth Circuit decision directly conflicts with *EEOC v. American Airlines, Inc.*, 48 F.3d 164 (5th Cir. 1995), and "cabins preclusion doctrine so narrowly as to render it useless." App. 26a.

Judge O'Scannlain also dissented from the majority's holding that a disparate impact claim is cognizable under the ADEA, criticizing the majority for relying exclusively on the vacated and hence "defunct" decision in *Arnett* to support its conclusion. App. 33a.

REASONS FOR GRANTING THE WRIT

This case presents the Court with an opportunity finally to decide a question on which it has granted certiorari three times in the past: whether members of a "mandatory" Rule 23(b)(1) or (2) class are freed from the preclusive effect of a class judgment if they subsequently pursue a damages action. *See Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994) (certiorari dismissed as improvidently granted); *Adams v. Robertson*, 520 U.S. 83 (1997) (certiorari dismissed as im-

providently granted); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (decided on other grounds). The Ninth Circuit's answer – that class members without opt-out rights are not bound in subsequent damages suits – means that Rule 23(b)(1) and (2) class actions can bring no finality for defendants, as this case so amply illustrates, and thus cannot operate as intended. The Ninth Circuit's rule is also in conflict with decisions of other courts of appeals, which treat adequate representation, rather than opt-out rights, as the key to preclusion in the class action context.

The decision below rests in part on a second, and equally unsound, rule of preclusion. According to the Ninth Circuit, any subsequent change in the facts underlying a judgment deprives the judgment of preclusive effect, regardless of whether that change has any bearing at all on the legal claims at issue. Here, the plaintiff class's Title VII claim focuses on the differences in allowable weights for men and women. But according to the Ninth Circuit, the fact that United increased its weight allowances by *identical amounts* for men and women somehow nullifies the effect of the original class judgment – which sustained precisely the *same* differential between male and female weight allowances. The Ninth Circuit's new test cannot be reconciled with *Montana v. United States*, 440 U.S. 147, 157-58, 62 (1979), under which factual changes defeat preclusion only when they are "significant" and "material" to the underlying claims, and directly conflicts with *EEOC v. American Airlines*, 48 F.3d 164 (5th Cir. 1995), as well as numerous other court of appeals decisions.

Finally, the decision below deepens a persistent circuit split on an entirely separate question: whether disparate impact claims are cognizable under the Age Discrimination in Employment Act ("ADEA"). The Court reserved this question in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), though its reasoning suggested that only disparate treatment

claims are cognizable under the ADEA. In fact, the Tenth Circuit reviewed this same United policy and concluded that the ADEA did *not* permit disparate impact claims. *Ellis v. United Airlines, Inc.*, 73 F.3d 999 (10th Cir. 1996). Given the practical importance of this question to the millions of employees and employers affected, the Court should take this opportunity to clarify the import of *Hazen Paper* and resolve the issue.

I. THE NINTH CIRCUIT'S RULING ON THE PRECLUSIVE EFFECT OF THE *ALPA* CLASS ACTION JUDGMENT MARKS A DRAMATIC CHANGE IN PRECLUSION LAW AND CONFLICTS WITH NUMEROUS COURT OF APPEALS DECISIONS.

The Ninth Circuit offered two reasons as to why the *ALPA* judgment did not preclude re-litigation of United's policy: that the Rule 23(b)(2) *ALPA* class did not permit class members to opt out, and that United's revisions to its policy – the two pound increase for both women and men – rendered preclusion inoperative. Both of these extraordinary justifications conflict with the decisions of this Court and numerous courts of appeals, and require this Court's review.

A. The Ninth Circuit's Rule That Opt-Out Rights Are Necessary Before Class Action Judgments Will Be Given Full Preclusive Effect Raises A Fundamental Question About Preclusion Law That This Court Previously Has Granted, But Never Resolved.

The Ninth Circuit's first rationale can be stated simply: a judgment in a class action does not have full preclusive effect – that is, it will not preclude subsequent claims for monetary damages – unless potential class members were entitled to opt out of the action. This rule would render Rule

23(b)(2) of the Federal Rules of Civil Procedure, which allows for class certification without an opt-out right, a tool for binding defendants but not plaintiffs. It runs directly contrary to the terms and purpose of Rule 23, and departs sharply from decisions in other courts of appeals.

This Court has three times granted certiorari to resolve whether and when members of a "mandatory class" – class members without opt-out rights – may be bound by a class judgment, but the Court was unable to reach the issue in any of those cases. *See Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994) (certiorari dismissed as improvidently granted); *Adams v. Robertson*, 520 U.S. 83 (1997) (certiorari dismissed as improvidently granted); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (decided on other grounds).[5] This case does not present the vehicle problems that plagued *Ticor Title* and *Adams*, and the Court should take this opportunity to resolve this very important question.[6]

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[5] The question presented in *Ticor Title* was, "Whether a federal court may refuse to enforce a prior federal class action judgment, properly certified under Rule 23, on grounds that absent class members have a constitutional due process right to opt out of any class action which asserts monetary claims on their behalf." The question presented in *Adams* was, "Whether the certification and settlement of this nationwide state court class action, with no right to opt out, violate the Due Process Clause of the Fourteenth Amendment when the claims extinguished by the settlement are predominately, if not exclusively, monetary damages claims." One of the questions granted in *Ortiz*, but not definitively answered, was, "Does the Due Process Clause permit a federal court to bind absent class members (including residents of the state where the action is brought) to a class action judgment that alters their *in personam* claims for money damages without giving them a chance to opt out, when those class members lack minimum contacts with the forum state."

[6] The Court dismissed *Adams* as improvidently granted because the question presented to the Court for review was not "addressed by or properly presented to the state court that rendered the decision." 520 U.S. at 86. Because the Ninth Circuit explicitly ruled on the preclusive effect of a Rule 23(b)(2) class action, the problem of *Adams* is not present here.

1. With virtually no explanation or supporting citation, the Ninth Circuit concludes that the procedural protections offered the *ALPA* class members were "not sufficient under Rule 23 to preclude monetary claims in later suits, for the class in *ALPA* was certified and given notice as a Rule 23(b)(2) 'injunction' class action." App. 10a. What the court deems dispositive is that unlike Rule 23(b)(3) – under which the instant class was certified – Rule 23(b)(2) does not require that potential class members be able to opt out. *Id.* 10a-11a. Because the *ALPA* class had no opt-out rights, the court holds, the *ALPA* judgment could not preclude the monetary claims raised in this Rule 23(b)(3) action. *Id.*[7]

The only case the Ninth Circuit cites to support this holding, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), is entirely inapposite. It does not address preclusion, Rule 23(b)(2), or opting out, but merely Rule 23(b)(3) notice and who must pay for it. *See Eisen*, 417 U.S. at 173-79 (Rule 23(b)(3) requires that plaintiff class receive notice and bear costs of notice).

Though nowhere cited in the decision below, the Ninth

For a discussion of the vehicle problem in *Ticor Title* (and its absence in this case), *see* note 8 *infra*.

[7] The Ninth Circuit addressed and rejected United's preclusion arguments only under the rubric of claim preclusion, paying no serious attention to United's alternative claim that re-litigation of respondents' allegations concerning its former weight requirements is barred by issue preclusion principles. App. 13a-14a; *id.* at 7a n.4 (distinguishing claim and issue preclusion). Though United believes, for the reasons set out in this petition, that claim preclusion applies in this case, it also preserves its alternative argument for application of issue preclusion principles under *Montana v. United States*, 440 U.S. 147 (1979). As argued to the district court and the Ninth Circuit, even if the technical requirements of claim preclusion do not apply, the issue decided by the Ninth Circuit – whether the differences between United's male and female charts constitute unlawful sex discrimination – was squarely decided in United's favor in the *ALPA* litigation.

Circuit's prior decision in *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1993), *cert. granted*, 510 U.S. 810, *cert. dismissed as improvidently granted*, 511 U.S. 117 (1994), seems clearly to be the basis for the court's holding. In *Ticor Title*, the Ninth Circuit held that under the Due Process Clause, class members may not be bound by a class judgment disposing of monetary claims unless they had been afforded an opportunity to opt out of the class litigation. 982 F.2d at 392. Because the prior class action in *Ticor Title* had been certified under Rules 23(b)(1) and (b)(2), neither of which provides opt-out rights, the court concluded that the prior class judgment had no preclusive effect with respect to damages claims. *Id.*; *see also Ticor Title*, 511 U.S. at 120 (discussing Ninth Circuit opinion).

The opinion below makes sense only as an application of the constitutional rule announced in *Ticor Title* – the rule this Court has already granted certiorari to review.[8] In the Ninth Circuit, absent class members have a due process right to opt out of any class action that asserts monetary claims on their behalf. *Ticor Title*, 982 F.2d at 392; *see also* 511 U.S. at 120 (describing *Ticor Title*). It apparently follows, as the court held below, that if potential class members are *not* given a right to opt out of litigation leading to a class judgment – as

[8] The ground on which the Court dismissed certiorari in *Ticor Title* does not apply in this case. In *Ticor Title*, as noted above, the initial Rule 23(b)(2) class sought monetary as well as equitable relief. This raised the question whether, under the Federal Rules of Civil Procedure, the initial class was properly certified under Rule 23(b)(2), or whether it should have been certified under Rule 23(b)(3) – in which case opt-out rights would have attached. Because that non-constitutional question could have disposed of the case, but was not properly before the Court, the Court dismissed the writ as improvidently granted. *Ticor Title*, 511 U.S. at 121-22.

In this case, by contrast, there is no question that the *ALPA* class, which sought only equitable relief, was properly certified under Rule 23(b)(2). *See supra* n. 1. The alternative rationale discussed by the Court in *Ticor Title* is therefore unavailable.

in 23(b)(2) class actions – then that judgment cannot preclude their subsequent monetary claims. App. 11a.

2. The Ninth Circuit's rule basing the preclusive effect of a class action judgment on the presence or absence of opt-out rights is inconsistent with the structure and purpose of Rule 23. Rule 23(b)(2), like Rule 23(b)(1) and in pointed contrast to Rule 23(b)(3), does not provide for any right to opt out. But the essential function of certifying a class action under *any* of the subsections of Rule 23, *including* Rule 23(b)(2), is to give the resulting judgment binding effect on all class members under normal principles of *res judicata*. *See* Rule 23(c)(3) and Fed. R. Civ. P. 23 1966 Advisory Committee's Note, *reprinted in* 39 F.R.D. 69, 105-06; 5 James Wm. Moore et al., *Moore's Federal Practice* § 23.11 (3d ed. 1997); 7B Charles Alan Wright et al., *Federal Practice and Procedure* § 1789 (2d ed. 1986) (hereinafter "Wright & Miller"). To deny full preclusive effect to class actions under Rule 23(b)(1) and (b)(2), as is the rule under *Ticor Title* and the decision below, effectively invalidates class certification under those provisions whenever claims for monetary damages are subsequently raised.

The practical effects of this rewriting of Rule 23 are stark. First, the decision below creates a no-win situation for the defendant in a Rule 23(b)(2) class action. If the defendant loses, it is subject to declaratory and equitable relief, including back pay, and may be fully bound by that result in a subsequent suit for monetary relief. If the plaintiff class loses, on the other hand, it is entirely free to re-litigate the merits of the case, simply by filing a second lawsuit seeking damages. This "heads I win, tails you lose" scenario is precisely what the drafters of Rule 23 sought to avoid when they amended the Rule in 1966: the 1966 amendments eliminated so-called "one-way interventions," in which potential class members could secure the benefits of class judgments without being bound by them, by providing that *all* class judg-

ments were entitled to full preclusive effect. *See* Advisory Committee's Note, 39 F.R.D. at 105-06.

Second, the decision below permits duplicative litigation of the same issues – exactly what has occurred here. Repetitious litigation of this sort always burdens both the courts and litigants.[9] But it is especially problematic when – as is necessarily the case under the Ninth Circuit rule – the prior judgment denied preclusive effect comes in a Rule 23(b)(1) or (2) class action. Under those provisions, class treatment is appropriate precisely because separate proceedings might be inequitable or impracticable, creating a risk of inconsistent or incompatible relief or exhausting a limited pool of funds before all plaintiffs can be compensated. *See* Fed. R. Civ. P. 23(b)(1)(2). By definition, depriving such a class judgment of full preclusive effect promotes the risk of unfair and inconsistent treatment of plaintiffs and defendants, the very results that a properly certified 23(b)(1) or (b)(2) class action is designed to avoid.[10]

Nor will the undesirable effects of the Ninth Circuit's

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[9] The unfairness of the burden that may be imposed on a defendant is amply illustrated here, where the Ninth Circuit not only allowed relitigation of the claim, but reached exactly the opposite conclusion from the *ALPA* court on the same issue – whether the differences between United's male and female charts were unlawful – despite the fact that the *ALPA* court rejected as inapposite the same evidence upon which the Ninth Circuit relied as a matter of law.

[10] Indeed, in these cases the interest in avoiding separate litigation is so strong that other circuits and leading commentators have expressed a *preference* for certifying class actions under Rules 23(b)(1) and (b)(2) where their standards are met – even if Rule 23(b)(3), with its opt-out rights, is also available – explaining that it is a virtue and not a vice that class members may be bound without a right to opt out of the litigation. *See, e.g., Kyriazi v. Western Elec. Co.*, 647 F.2d 388, 393 (3d Cir. 1981); *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 249, 253 (3d Cir. 1975); *In re A.H. Robins Co.*, 880 F.2d 709, 728 (4th Cir. 1989); 7A Wright & Miller, *supra*, § 1772, at 424-26.

rule be limited to that circuit, at least in any practical sense. A plaintiff class can file a class action against a national corporation like United in virtually any federal district court. Thus, a 23(b)(2) class that has lost a judgment can avoid the judgment by "forum shopping" – retooling its complaint to seek damages and proceeding as a 23(b)(3) class in any district court in the Ninth Circuit. A rush to re-litigate in the Ninth Circuit is especially likely to occur in Title VII cases. Until the Civil Rights Act of 1991, Title VII provided only for equitable relief, including backpay, so that Title VII class actions were certified almost exclusively under Rule 23(b)(2), with no opt-out rights. Accordingly, unless this Court reverses the decision below, *any* pre-1991 judgment in a Title VII class action, as well as most post-1991 class judgments, would be open to re-litigation if the class simply seeks damages and files in the Ninth Circuit.

3. The decision below ignores a long line of Supreme Court precedent regarding the preclusive effect of a class action judgment. It is also in conflict with decisions of other courts of appeals that have rejected the Ninth Circuit's premise and instead have followed the approach set out by this Court.

a. The opinion below, like *Ticor Title*, departs dramatically from well established Supreme Court precedent that bases the preclusive effect of a class action judgment not on whether the original class litigation provided an opportunity to opt out, but instead on whether class members were adequately represented in the previous litigation. In its seminal class action case, *Hansberry v. Lee*, 311 U.S. 32 (1940), the Court acknowledged the general principle that everyone is entitled to his or her day in court, *id.* at 40, but concluded that "there is scope within the framework of the Constitution for holding in appropriate cases that a judgment rendered in a class suit is *res judicata* as to members of the class who are not formal parties to the suit," *id.* at 42. Ac-

cording to the Court, the touchstone of *res judicata* in the class action context is adequate representation: "It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present." *Id.* at 42-43; *see also id.* at 42 ("this Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it").

In numerous cases since *Hansberry*, the Court has continued to stress the critical role of adequate representation in evaluating the preclusive effect of a class judgment. *See, e.g., Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989) ("We have recognized an exception to the general rule [that everyone is entitled to his or her day in court] when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party."); *Sam Fox Pub. Co. v. United States*, 366 U.S. 683, 691 (1961) ("the judgment in a class action will bind only those members of the class whose interests have been adequately represented by existing parties to the litigation."); *Richards v. Jefferson County*, 517 U.S. 793, 800-02 (1996) (holding that an earlier judgment had no preclusive effect because class representatives did not adequately represent interests of class members). *See also* Herbert Newberg & Alba Conte, *Newberg on Class Actions* §1.13 (3d ed. 1992) (rights of absent class members are protected as matter of due process if members are adequately represented in litigation).

The Court recently has highlighted the importance of adequate representation in the context of mandatory class actions like the one at issue here. In *Ortiz v. Fibreboard*, the Court noted the "tension" between the "day-in-court ideal" and mandatory class actions, in which class members have

no legal right to opt out of the litigation. 119 S. Ct. at 2314. But the Court never has suggested that mandatory class judgments are excluded from the normal rules of *res judicata*. Instead, the Court held, federal courts must exercise "heightened attention" when certifying mandatory classes to ensure that class members are adequately represented. *Id.* at 2316. *See also Amchem Prod. v. Windsor*, 521 U.S. 591, 621 (1997) (noting the need for careful review of class certification to ensure adequate representation "so that absent members can fairly be bound by decisions of class representatives").[11]

b. The Ninth Circuit's conclusion that the absence of opt-out rights itself suffices to deprive Rule 23(b)(1) and (b)(2) class judgments of full preclusive effect is – not surprisingly – in conflict with decisions of other courts of appeals. Those courts have held that a class judgment precludes monetary claims regardless of whether class members are entitled to opt out of the litigation. *See Kyriazi*, 647 F.2d at 393 (judgment in Rule 23(b)(2) class action binds class members as to monetary claims despite lack of opt-out rights); *In re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1425, 1435 (2d Cir. 1993) (rejecting argument that due process requires opt-out rights before class members unaware of injuries may be bound as to monetary claims); *see also Gonzales v. Cassidy*, 474 F.2d 67, 74 & n.12 (5th Cir. 1973) (Rule 23(b)(2) class actions generally afforded preclusive effect despite absence of opt-out rights).

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[11] It is not clear whether notice plays any independent role in determining the preclusive effect of a class judgment where the adequate representation standard is met. *See Richards*, 517 U.S. at 799-800 (assuming without deciding that adequate representation may "cure" a lack of notice). That question is not implicated here. Although the Ninth Circuit briefly discussed notice requirements, it expressly declined to base its holding on the notice provided to the *ALPA* class members. App. 10a-11a.

Following the lead of this Court, the courts of appeals other than the Ninth Circuit treat adequate representation, rather than a right to opt out, as the critical factor necessary to bind absent class members to a class judgment under both Rule 23 and the Due Process Clause. *See, e.g., In re Agent Orange*, 996 F.2d at 1435 (absent class members' interests best protected by "ensuring that they receive vigorous and faithful vicarious representation"); *Gonzales*, 474 F.2d at 74 (due process requires adequate representation for class judgment to be *res judicata* as to absent class members); *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 256 (3d Cir. 1975) ("as long as the representation is adequate and faithful, there is no unfairness in giving res judicata effect to a judgment against all members of [a Rule 23(b)(2)] class"); *Laskey v. UAW*, 638 F.2d 954, 956-57 (6th Cir. 1981) (adequate representation, rather than opt-out right, as precondition for binding absent class members to judgment).[12]

By resurrecting *Ticor Title* in the decision below, the Ninth Circuit reiterated its disagreement with an entire line of Supreme Court cases and with the majority approach in the courts of appeals.[13] In light of the profound implications

[12] In these federal circuits, the vehicle for challenging the adequacy of representation is generally a collateral attack in the court in which the prior class judgment is offered as a defense. *See, e.g., Gonzales*, 474 F.2d at 75 (permitting plaintiff to collaterally attack adequacy of prior class representation). This is in keeping with the "recognized principle that the court conducting the action cannot predetermine the *res judicata* effect of the judgment; this can be tested only in a subsequent action." Advisory Committee's Note, 39 F.R.D. at 106; *see also* 7B Wright & Miller, *supra*, § 1789, at 245-46; Note, *Binding Effect of Class Actions*, 67 Harv. L. Rev. 1059, 1060 (1954).

[13] In discussing the effect on subsequent litigation of the *ALPA* "settlement," the court below did "note that the terms of the settlement in *ALPA* appear not to protect the interests" of all class members. App. 11a. But as explained *supra* at n. 4, United relied solely on the *ALPA* judgment and not any settlement for its preclusion arguments. In any event, the panel's allusion to the merits of the post-judgment agreement between the plaintiff class and United cannot have been intended as a find-

of this ruling for the viability of Rule 23(b)(1) and (2) class actions, the Ninth Circuit's decision merits the Court's immediate attention.

B. The Ninth Circuit's Holding That Immaterial Factual Changes Deprive A Judgment Of Any Preclusive Effect Conflicts With The Decisions Of This Court And Of Numerous Courts Of Appeals.

Although the Ninth Circuit ostensibly offered two additional reasons why the *ALPA* judgment cannot be given preclusive effect – that a "new" Title VII claim arose after the 1979 *ALPA* judgment and that this new claim was based on a different weight policy – these separately stated reasons are merely two ways of saying the same thing: United's implementation of a revised and more liberal policy in 1980, pursuant to the *ALPA* judgment, stripped the 1979 *ALPA* judgment of preclusive effect. *See* App. 24a (O'Scannlain, J., dissenting) (rationales are "part and parcel of the same argument" and "logically indistinguishable"). This is so, under the Ninth Circuit's rationale, regardless of whether the changes to United's weight policy – which in fact applied even-handedly to men and women – had any material bearing on the legal claims at issue. The Ninth Circuit's conclusion squarely conflicts with decisions of several other courts of appeals, ignores controlling Supreme Court precedent, and represents a fundamental change in preclusion law that will be felt nationwide.[14]

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ing of inadequate representation by the *ALPA* class representatives. Respondents never challenged the adequacy of the *ALPA* representation before the district court or the Ninth Circuit, and there was accordingly no opportunity to defend the adequacy of that representation. As Judge O'Scannlain recognized, by failing "to assert that they were inadequately represented," respondents "have simply waived the 'inadequate representation' argument." App. 31a.

[14] To the extent the Ninth Circuit intended to put independent weight on its "first" rationale and suggest that a class action judgment cannot

1. Until now, it had long been understood that "[a]bsent *significant* changes in controlling facts," an earlier judgment on the merits precludes re-litigation of the same issue. *Montana v. United States*, 440 U.S. 147, 157-58 (1979); *see id.* at 162 ("normal rules of preclusion should operate" when the factual context "in which the issues . . . arise has not *materially* altered") (emphases added); *see also* 18 Moore et al., *supra*, § 132.02[2][e] (whether preclusion applies depends "on whether controlling facts have changed significantly since the earlier judgment"). In other words, immaterial factual changes do not override the important principles of preclusion.

The Ninth Circuit's decision directly conflicts with *EEOC v. American Airlines Inc.*, 48 F.3d 164 (5th Cir. 1995), in which the Fifth Circuit faced a situation virtually identical to this one but came to a very different result. That case began with a 1970s class action challenging American's employment policy under the ADEA. The Court of Appeals for the District of Columbia Circuit upheld the policy in 1981. *Murnane v. American Airlines, Inc.*, 667 F.2d 98 (D.C. Cir. 1981). American subsequently revised its policy in favor of the class, expanding the pool of individuals eligible for employment. *American Airlines*, 48 F.3d at 166. The EEOC then filed suit against American, arguing that its revised policy violated the ADEA. When American argued that the 1981 judgment precluded re-litigation of the policy's legality, EEOC responded that the "new, more liberal policy" negated any preclusive effect that the 1981 judgment may otherwise have had. *Id.* at 167. Applying *Montana*, the

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bind future class members, its reasoning flies in the face of longstanding preclusion principles. It is well established that a judgment in a class action "may actually bind future claimants, *i.e.*, those persons whose claims have not ripened at the time the judgment is entered but who subsequently come within the defined class." 18 Moore et al., *supra*, § 131.40[3][e][iii].

Fifth Circuit described the EEOC's position – identical to the Ninth Circuit's here – as "both counterintuitive and illogical." *Id.* at 169. As the Fifth Circuit stated, "[i]t is not enough to avoid the preclusive effect of the prior determination for the EEOC to show merely a change in facts: a change must have occurred in facts that were essential to the judgment and were 'of controlling significance.'" *Id.* at 168 (citing *Montana*, 440 U.S. at 159-61).

The Ninth Circuit's decision also conflicts with virtually every court of appeals that has considered this question. Like the Fifth Circuit, the federal courts of appeals – with the exception of the Ninth Circuit in the opinion below – have consistently applied *Montana*'s "significant changes" test to determine whether subsequent factual changes deprive an earlier judgment of preclusive effect. *See, e.g., DeCosta v. Viacom Int'l, Inc.*, 981 F.2d 602, 605, 610-12 (1st Cir. 1992) (Breyer, C.J.) (holding that an earlier judgment had preclusive effect because there were no significant factual changes); *Niagara Frontier Tariff Bureau, Inc. v. United States*, 826 F.2d 1186, 1190 (2d Cir. 1987) (applying *Montana* to hold judgment preclusive absent "changes in controlling facts"); *Raytech Corp. v. White*, 54 F.3d 187, 193-95 (3d Cir. 1995) (applying *Montana* to hold judgment preclusive because evidence of new facts did not "establish a change in facts essential to the [earlier] judgment."); *Coleman v. Commissioner of Internal Revenue*, 16 F.3d 821, 830-31 (7th Cir. 1994) (holding judgment preclusive because there was "no significant change in the controlling facts"); *RTS Inv. Corp. v. Commissioner of Internal Revenue*, 877 F.2d 647, 650 (8th Cir. 1989) (citing *Montana* for proposition that there is no relitigation when "factual and legal context . . . [are] not materially altered" since the original judgment); *Klein v. Commissioner of Internal Revenue*, 880 F.2d 260, 262-64 (10th Cir. 1989) (applying *Montana* to hold judgment preclusive because new testimony did not "alter the controlling facts"); *North Georgia Elec. Membership Corp. v. City of Calhoun*,

989 F.2d 429, 436 (11th Cir. 1993) (applying *Montana* to bar re-litigation because there was no change to "[t]he facts essential to the judgment"); *Cutler v. Hayes*, 818 F.2d 879, 890 n.88 (D.C. Cir. 1987) (applying *Montana* to hold that the alleged new facts were "immaterial to the legal basis on which the [earlier] court's ultimate findings on standing rested, and so could not demonstrate a change in controlling facts sufficient to justify an exception to [preclusion] principles."); *Arkla, Inc. v. United States*, 37 F.3d 621, 625 (Fed. Cir. 1994) (applying *Montana* to hold that "because neither factual difference in this case alters any of these facts essential to the judgment [in the earlier litigation], the differences do not prevent operation" of preclusion).

The Ninth Circuit, by contrast, has ignored the clear language of *Montana* and applied a different test for determining when factual changes deprive a prior judgment of preclusive effect: preclusion does not apply unless "the two suits arise out of the same transactional nucleus of facts," App. 10a, and regardless of whether any factual change is significant or material to the legal claims at issue. Under this test, it appears that any revision to a previously approved policy – no matter how immaterial and even if favorable to plaintiffs – will necessarily thwart the defense of preclusion. In the Ninth Circuit, whether a change was significant or involved a controlling fact – the key inquiry in *Montana* and the courts of appeals following *Montana* – is wholly irrelevant.

The difference is much more than semantic. If the Ninth Circuit had applied *Montana*'s "significant changes" test, which governs in the First, Second, Third, Fifth, Seventh, Eighth, Tenth, Eleventh, D.C., and Federal Circuits, United's across-the-board two-pound increase in allowable weights and further increases based upon age – revisions favorable to the plaintiff class and applied equally to men and women – would not constitute a change sufficiently material to deprive the *ALPA* judgment of preclusive effect. *See* App. 26a

(O'Scannlain, J., dissenting) (applying correct standard and finding that "the new policy does not differ from the old one in any way that is itself material to the plaintiffs' claim").

If, on the other hand, the Fifth Circuit in *EEOC v. American Airlines* had applied the standard that now governs in the Ninth Circuit, there is no doubt that the EEOC could have re-litigated the legality of American's revised and liberalized policy on the theory that its new claim did not arise from the "same transactional nucleus of facts" as the prior judgment. In fact, if American Airlines has revised its policy since the Fifth Circuit's decision in *American Airlines*, the EEOC will now be free to challenge American's policy simply by filing yet another suit in a Ninth Circuit district court. Equally perplexing, if United reinstates its weight policy and adds two pounds to its charts (or even deducts two pounds), United apparently could re-litigate the validity of its weight policy despite the Ninth Circuit's holding below, for according to the Ninth Circuit, the "new" policy would not arise from the "same transactional nucleus of facts" underlying the claims in this case.

2. The Ninth Circuit's new test creates a giant preclusion loophole, permitting unsuccessful plaintiffs to re-litigate the legality of hundreds of policies already upheld by other courts throughout the country simply by filing suit in the Ninth Circuit. Policies like the one at issue here – litigated, approved, and subsequently revised in favor of a plaintiff class – will become fair game for complete re-litigation, even though all of the parties had understood that the matter was settled years ago and acted accordingly. If this decision is allowed to stand, plaintiffs and defendants alike will suffer the consequences: defendants, because their policies, once upheld, will remain subject to attack if they make even the most insignificant of changes; and plaintiffs, because they will soon find that defendants are unwilling to open themselves up to repeat litigation by making accommodations that

would have been favorable to the plaintiffs' interests. The doctrines of preclusion exist to prevent these very results.[15]

II. THE FEDERAL CIRCUITS ARE SHARPLY DIVIDED ON WHETHER DISPARATE IMPACT CLAIMS ARE COGNIZABLE UNDER THE ADEA AFTER THIS COURT'S DECISION IN *HAZEN PAPER*.

The Ninth Circuit's holding that the ADEA permits a disparate impact claim directly conflicts with decisions of the First, Seventh, and Tenth Circuits. Those courts of appeals, which have carefully analyzed the question in light of *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), have concluded that the ADEA provides no action for disparate impact. The Ninth Circuit, on the other hand, like the Second and Eighth Circuits, continues to cling to pre-*Hazen* case law and hold that the ADEA allows disparate impact actions. The question is one of immense practical importance both to employees and employers, given that tens of millions of workers qualify for ADEA protection. The pronounced circuit conflict on this question merits this Court's review.

1. In *Hazen Paper*, the question before the Court was whether "an employer violates the ADEA by acting on the basis of a factor . . . that is empirically correlated with age." 507 U.S. at 608. The Court distinguished between disparate treatment claims, which turn on whether the protected trait motivated the employer, and disparate impact claims, which involve facially neutral practices that in fact fall more harshly on one group than another and cannot be justified by business necessity. *Id.* at 610. The Court then concluded

[15] Even if the Ninth Circuit correctly concluded that the *ALPA* judgment lacked preclusive effect, it erred in granting respondents summary judgment on the issue of Title VII liability, as there were undoubtedly material issues of fact still in dispute. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

that no cause of action for disparate treatment is available under the ADEA when a factor other than age motivates an employer, even if that factor is correlated with age. *Id.* at 609.

Hazen Paper specifically left open the question whether the ADEA permits an action for disparate impact. *See id.* at 610. The opinion, however, makes clear that "[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA." *Id.* What Congress was concerned about, the Court held, was the denial of employment opportunities to older workers based on their *age* and on "inaccurate and stigmatizing stereotypes" that they would be unproductive because of their age. *Id.* at 610-11. But "the problem of inaccurate and stigmatizing stereotypes disappears" when an employer's conduct is "motivated by factors other than age." *Id.* at 611. And "[t]his is true even if the motivating factor is correlated with age." *Id.*

What the Court in *Hazen Paper* describes as falling *outside* the concerns that animated the ADEA is a disparate impact claim – a claim that an employment policy, though not actually based on age, correlates so closely with age that it has a disproportionate impact on older employees. "[T]he inescapable implication of [the Court's] statements is that the imposition of disparate impact liability would not address the evils that Congress was attempting to purge when it enacted the ADEA." *Mullin v. Raytheon Co.*, 164 F.3d 696, 701 (1st Cir. 1999). Indeed, in a separate concurring opinion to *Hazen Paper*, Justice Kennedy, joined by the Chief Justice and Justice Thomas, emphasized this point, referring to "substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA." 507 U.S. at 618.

2. The text and history of the ADEA support the Court's indication in *Hazen Paper* that the ADEA does not recognize disparate impact claims. The ADEA prohibits employment

decisions based upon the age of any employee forty years or older. 29 U.S.C. §§ 623(a), 631(a) (1994). But the ADEA also expressly provides that "[i]t shall not be unlawful for an employer . . . to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors *other than age*." 29 U.S.C. § 623(f)(1) (1994) (emphasis added). By definition, a disparate impact claim rests upon a factor "other than age;" an employment decision actually based upon age is an action for disparate treatment, not disparate impact. It follows that § 623(f)(1) precludes a disparate impact claim under the ADEA. *See Markham v. Geller*, 451 U.S. 945, 949 (1981) (Rehnquist, J., dissenting from denial of certiorari) (citing 29 U.S.C. § 623(f)(1) as conclusive evidence that Congress did not intend the ADEA to recognize disparate impact claims).

Not surprisingly, the Court came to just this conclusion when reviewing virtually identical language in the Equal Pay Act, 29 U.S.C. § 206(d), which prohibits wage discrimination based on sex but excepts payment of differential wages to men and women "based on any other factor *other than sex*." 29 U.S.C. § 206(d)(1)(iv) (1994) (emphasis added). *See County of Washington v. Gunther*, 452 U.S. 161, 169-70 (1981). A disparate impact claim simply cannot be reconciled with such limits on liability: "The prohibition and exception appear identical. The sentence is incomprehensible unless the prohibition forbids disparate treatment and the exception authorizes disparate impact." Douglas Laycock, *Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues*, 49 L. & Contemp. Probs. 53, 55 (1986) (discussing Equal Pay Act). Even before the decision in *Hazen Paper* caused the Seventh Circuit to change its course, Judge Easterbrook observed that the "language, structure, and history of the ADEA have led thoughtful people to conclude . . . that disparate impact analysis is inapplicable in ADEA cases." *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1220 (7th Cir. 1987) (Easterbrook, J., dissenting).

3. Despite the import of *Hazen Paper* and the terms of the ADEA itself, the federal circuits are deeply divided over whether the ADEA permits disparate impact claims. Several courts of appeals have analyzed the issue carefully in light of *Hazen Paper* and concluded that the ADEA does not recognize disparate impact claims. *See Mullin*, 164 F.3d at 700, 703-04 ("[t]he tectonic plates [of ADEA disparate impact law] shifted" after *Hazen Paper*, precluding disparate impact liability under the ADEA); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1009 (10th Cir. 1996) (reviewing the same United policy and holding that "one cannot read [*Hazen Paper*] without receiving the strong impression that the Supreme Court is suggesting that the ADEA does not encompass a disparate impact claim."); *EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073, 1076-78 (7th Cir. 1994) (*Hazen Paper* bars ADEA disparate impact claims).[16]

The Second, Eighth, and Ninth Circuits, on the other hand, have considered the question after *Hazen Paper* but continue to rely on their own pre-*Hazen Paper* case law to recognize disparate impact claims under the ADEA. The Second Circuit has acknowledged both *Hazen Paper* and the conflict in the courts of appeals, but continues to hold that the ADEA allows for suits under disparate impact theories. *District Council 37 v. New York City Dep't of Parks & Recreation*, 113 F.3d 347, 351 (2d Cir. 1997); *see also Smith v.*

[16] Other circuits have suggested that *Hazen* forecloses disparate impact claims under the ADEA. *Broaddus v. Florida Power Corp.*, 145 F.3d 1283, 1287 (11th Cir. 1998) (citing *Hazen* for the proposition that the "ADEA does not prohibit an employer from making an employment decision on the basis of higher salaries, increased benefits, pension status, or claims for medical expenses even though these characteristics are often correlated with an employee's age."); *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1048 (6th Cir. 1998) (*Hazen* creates "considerable doubt" that disparate impact claims are available under the ADEA) (citation omitted); *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 733 (3d Cir. 1995) (op. of Greenberg, J.) ("it is difficult to see how disparate impact liability can survive" *Hazen*).

Xerox Corp., 196 F.3d 358, 367 n.6 (2d Cir. 1999) (reiterating that ADEA permits disparate impact claims but recognizing split with First, Seventh, and Tenth Circuits). The Eighth Circuit takes the same position. *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 950 (8th Cir. 1999) (recognizing split among federal circuits but adhering to circuit precedent allowing disparate impact claims under ADEA). And the Ninth Circuit repeatedly has refused to acknowledge that *Hazen Paper* has any impact upon ADEA disparate impact law, despite what the other courts of appeals may think. *See, e.g., EEOC v. Local No. 350*, 998 F.2d 641, 648 n.2 (9th Cir. 1993) ("We perceive no conflict between *Hazen*" and an ADEA disparate impact challenge). As the First Circuit has noted, these opinions substitute "reliance on pre-*Hazen Paper* precedents and the law of the circuit doctrine" for careful analysis of *Hazen Paper*. *Mullin*, 164 F.3d at 701.

This case, in which the Ninth Circuit held that respondents' claims were not actionable under disparate treatment theory but were actionable under a disparate impact theory, *see* note 3, *supra*, squarely presents the question whether the ADEA recognizes disparate impact claims. The Ninth Circuit's holding deepens the split in the federal circuits on that question. The Court should grant review to clarify the impact of *Hazen Paper* and resolve this important issue.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 98-15638, 98-16687

LESLIE FRANK; PAT PARNELL; SUSAN BRODERICK; CAROLE KIRK; NICHKOL MELANSON; SANDRA HUFF; DIANE DAVIS; SHARON BENJAMIN; SHARRON K. TAYLOR; BLAND LANE; JOAN BALLA WEAVER; DONNA DURKIN; ELLEN MCCORMICK,

Plaintiffs-Appellants,

v.

UNITED AIRLINES, INC.,

Defendant-Appellee.

Appeals from the United States District Court for the Northern District of California.

June 21, 2000

Before: REINHARDT, O'SCANNLAIN, and W. FLETCHER, Circuit Judges.

W. FLETCHER, Circuit Judge:

From 1980 to 1994, defendant United Airlines, Inc. ("United") required flight attendants to comply with maximum weight requirements based on sex, height and age. Failure to maintain weight below the applicable maximum subjected a flight attendant to various forms of discipline, including suspension without pay and termination. In 1992, plaintiffs filed this action on behalf of a class of female flight attendants to challenge these weight requirements.

Plaintiffs contend that by adopting a discriminatory weight policy and enforcing that policy in a discriminatory manner, United discriminated against women and older flight attendants in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e; the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634; the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213; and the California Fair Employment and Housing Act ("FEHA"), Cal. Gov't Code §§ 12900- 12996. The district court granted summary judgment for defendant on all of plaintiffs' class and individual claims. We have jurisdiction under 28 U.S.C. § 1291. We reverse in part and affirm in part.

I

During the 1960s and early 1970s, the standard practice among large commercial airlines was to hire only women as flight attendants. The airlines required their flight attendants to remain unmarried, to refrain from having children, to meet weight and appearance criteria, and to retire by the age of 35. See Gerdom v. Continental Airlines, Inc., 692 F.2d 602, 605-06 (9th Cir.1982) (en banc) (collecting cases). Like other airlines, defendant United had a long-standing practice of requiring female flight attendants to maintain their weight below certain levels. After it began hiring male flight attendants in the wake of Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir.1971), United applied maximum weight requirements to both male and female flight attendants.[1] Flight attendants--a group comprised of

[1] Although United historically had male flight attendants of Hawaiian descent on flights to Hawaii, those positions were treated as a separate category from other flight attendant positions, and United did not require the "Hawaiian stewards" to meet weight restrictions. Even after United began hiring men as flight attendants on non-Hawaiian flights and

approximately 85% women during the time period relevant to this suit--are the only employees United has ever subjected to maximum weight requirements. United abandoned its weight requirements for flight attendants in 1994.[2]

Between 1980 and 1994, United required female flight attendants to weigh between 14 and 25 pounds less than their male colleagues of the same height and age. For example, the maximum weight for a 5'7", 30-year-old woman was 142 pounds, while a man of the same height and age could weigh up to 161 pounds. A 5'11", 50-year-old woman could weigh up to 162 pounds, while the limit for a man of the same height and age was 185 pounds. United's weight table for men during this period was based on a table of desirable weights and heights published by the Metropolitan Life Insurance Company ("MetLife"). The comparable weight table for women was based on a table of maximum weights established by Continental Air Lines ("Continental"). A comparison of United's MetLife-derived limits for men to the Continental-derived weight limits for women reveals that United generally limited men to maximum weights that corresponded to large body frames for men on the MetLife charts but generally limited women to maximum weights that corresponded to medium body frames for women on MetLife charts.

The thirteen named plaintiffs worked for United as flight attendants while United's 1980-1994 weight policy was in effect. The named plaintiffs attempted to lose weight by various means, including severely restricting their caloric

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established maximum weight requirements for male flight attendants, the Hawaiian stewards remained exempt from weight requirements.

[2] United suspended its weight program for approximately one year from September 1991 to September 1992. While that suspension may be relevant to damages, it is not relevant to the legal validity of plaintiffs' claims.

intake, using diuretics, and purging. Ultimately, however, plaintiffs were each disciplined and/or terminated for failing to comply with United's maximum weight requirements. In 1992, plaintiffs filed this employment discrimination action. They sought to represent plaintiff classes of female flight attendants for claims of sex and age discrimination, and they asserted various claims of individual discrimination.

On March 15, 1994, the parties stipulated to certify a plaintiff class for the Title VII sex discrimination claim and a plaintiff subclass of members over 40 years old for the ADEA age discrimination claim. On April 12, 1994, the district court certified a Title VII class comprised of

> all female flight attendants employed by United, currently or in the future, and all female flight attendants who were terminated, retired or resigned on or after January 5, 1989, as a result of their failure to comply with United's weight requirements[;]

and an ADEA subclass comprised of

> all female flight attendants, age 40 or above, employed by United currently, or who were terminated, retired or resigned after January 5, 1989 as a result of their failure to comply with United's weight requirements.

Neither party challenges the 1989 cutoff date for certification of the class.

The parties stipulated in the class certification order that individual notice would be sent to all members of the Title VII class and all potential members of the ADEA subclass. Although the order stated that the class was certified under Federal Rule of Civil Procedure 23(b)(2), as a so-called "injunction" class action, the notice actually sent satisfied the heightened notice required for a Rule 23(b)(3) "damages"

class action, set forth in Rule 23(c)(2). The parties agree that the suit subsequently became a Rule 23(b)(3) class action after United abolished its weight program in 1994, thereby eliminating the need for injunctive relief. A form of notice, attached to the stipulation, provided that class members could "opt out" of the class certified for the Title VII claim. A second form of notice, also attached to the stipulation, provided that potential class members could "opt in" to the subclass certified for the ADEA claim.

Shortly after the class and subclass were certified, United suspended its weight policy "until further notice" and returned to service all attendants then held out of service under its weight policy. On August 16, 1994, United eliminated the weight policy entirely. In 1995, United offered to reinstate many class and subclass members who had been terminated under the weight policy. United did not require individuals accepting reinstatement to waive any potential claims against it arising from earlier discipline or termination.

The parties filed cross-motions for summary judgment on plaintiffs' class claim that United's weight policy discriminated against female flight attendants in violation of Title VII. On August 16, 1995, the district court denied plaintiffs' motion and granted summary judgment for United. The court held that any facial attack on the weight policy was foreclosed by claim preclusion resulting from Air Line Pilots Ass'n Int'l v. United Air Lines, Inc. ("ALPA "), 26 F.E.P. Cases 607, 1979 WL 34 (E.D.N.Y.1979), a decision resolving a facial challenge to an earlier United weight policy. The district court permitted plaintiffs to go forward under Title VII only on claims that United discriminated in the administration of its weight policy.

On February 26, 1997, the district court granted summary judgment for United on plaintiffs' remaining class claims of

sex and age discrimination. The court held that plaintiffs had failed to present evidence of a pattern or practice of sex or age discrimination in the administration of the weight policy. The court further held that plaintiffs could not assert a disparate impact claim for sex discrimination based on United's administration of medical exceptions to the weight policy. Finally, applying the Tenth Circuit's decision in Ellis v. United Airlines, 73 F.3d 999 (10th Cir.1996), the court held that a disparate impact theory was not available under the ADEA.

On March 11, 1998, the district court entered an order granting summary judgment for United on all of plaintiffs' individual claims. The court decertified the age and sex discrimination classes and denied plaintiffs' application for costs.[3]

II

We review de novo decisions granting summary judgment. See Robi v. Reed, 173 F.3d 736, 739 (9th Cir.1999). Viewing the evidence in the light most favorable to plaintiffs, we must determine whether genuine issues of material fact preclude summary judgment and whether the district court correctly applied the relevant substantive law. See Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1220 (9th Cir.1998). Questions of claim and issue preclusion are also reviewed de novo. See C.D. Anderson & Co., Inc. v. Lemos, 832 F.2d 1097, 1100 (9th Cir.1987).

III

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[3] The district court did not, in most instances, separately address plaintiffs' FEHA claims, but the parties acknowledge that those claims rise or fall with plaintiffs' federal claims.

As a threshold matter, plaintiffs contend that the district court erred in holding that claim preclusion [4] foreclosed their facial attack under Title VII. "[A] valid final adjudication of a claim precludes a second action on that claim or any part of it." Baker ex rel. Thomas v. General Motors Corp., 522 U.S. 222, 233 n. 5, 118 S.Ct. 657, 139 L.Ed.2d 580 (1998). For claim preclusion to apply, there must be (1) an identity of claims in the two actions; (2) a final judgment on the merits in the first action; and (3) identity or privity between the parties in the two actions. See Western Radio Servs. Co. v. Glickman, 123 F.3d 1189, 1192 (9th Cir.1997) (citing Blonder-Tongue Labs., Inc. v. University of Ill. Found., 402 U.S. 313, 323- 24, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971)).

The district court concluded that plaintiffs' facial Title VII claim is precluded by the 1979 district court decision in ALPA v. United Air Lines, Inc., cited above. Plaintiffs in ALPA, the Air Line Pilots Association and individual named plaintiffs, claimed on behalf of a class of United flight attendants that United's 1977 weight policy discriminated against female flight attendants in violation of Title VII. Plaintiffs and United stipulated to class certification, and the district court certified a Rule 23(b)(2) class defined as

> all female flight attendants who are employed by United or who may become so employed in the future, and all former female flight attendants who were employed by United on or after October 14,

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[4] Rather than using the terms "res judicata" and "collateral estoppel," the Supreme Court has generally used the terms "claim preclusion" and "issue preclusion." *See Migra v. Warren City School Dist. Bd. Of Educ.*, 465 U.S. 75, 77 n.1, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984). "Claim preclusion" refers to the preclusive effect of a judgment in foreclosing relitigation of claims that were raised or should have been raised in earlier litigation, and "issue preclusion" refers to the preclusive effect of a judgement in foreclosing relitigation of issues that have been actually and necessarily decided in earlier litigation. *See id.*

> 1971 and were suspended, removed from service, or terminated by United for failure to meet United's flight attendant weight standards.

Id. at 609. Notice to current employees was accomplished by placing the notice in their employee boxes. Notice to former employees was attempted by sending it to their last-known addresses. Because the class was certified under Rule 23(b)(2), plaintiffs could not opt out of the class.

The district court in ALPA found that United's weight standards were not facially discriminatory, see 26 F.E.P. Cases at 615, 618, but that United had discriminated in applying those standards. See id. at 621-22. The court enjoined United from discriminating on the basis of sex in enforcing its weight standards, and it ordered reinstatement, back pay, and seniority credit for female flight attendants who had suffered discrimination. See id. at 626. The court wrote:

> United is free to continue using the flight attendant weight standards promulgated by United in May 1977. Nothing in the court's decision or order is intended to pass upon the validity of any other weight standard for male or female flight attendants that United might adopt in the future.... United's current weight standards for male and female flight attendants are valid,... United is not prohibited from adopting other standards, and ... the validity of any other standard has not been determined.

Id. at 626 (emphasis added).

After entry of judgment and while cross-appeals were still available, the parties settled the litigation. For their part, plaintiffs agreed not to appeal the district court's holding that the 1977 weight policy was not facially discriminatory. For its part, United agreed to alter its weight charts by slightly

increasing the weight limits and agreed not to appeal the district court's decision that United had discriminated in administering the weight policy. The terms of the settlement were described in a letter to the district court,[5] but the court was never asked to approve the settlement, as it would have been required to do under Rule 23(e) if the parties had entered into the same settlement prior to entry of judgment.

For several reasons, the district court in this case erred in giving claim preclusive effect to the ALPA judgment. First, the plaintiffs in this suit assert claims based on alleged Title VII violations arising after 1980. A claim arising after the date of an earlier judgment is not barred, even if it arises out of a continuing course of conduct that provided the basis for the earlier claim. See Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 328, 75 S.Ct. 865, 99 L.Ed. 1122 (1955) ("While the 1943 judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case."). Because the judgment in ALPA was entered in 1979, under Lawlor it cannot preclude claims based on events occurring after that date. See id.; see also International Techs. Consultants, Inc. v. Pilkington, PLC, 137 F.3d 1382, 1388 (9th Cir.1998) ("By winning the first action, the defendants 'did not acquire immunity in perpetuity from the antitrust laws.' ").

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[5] After the district court entered its order and judgment in ALPA, counsel for the plaintiff class wrote to the court "to confirm that ... neither side will appeal from any Order, Decision or Judgment heretofore issued by the Court[.]" A subsequent letter from class counsel stated, inter alia: "United has agreed to revise its flight attendant weight program, effective February 1, 1980. For the information of the Court, a copy of the new program is annexed hereto[.]"

Second, plaintiffs' Title VII claim is based on a different weight policy from that challenged in ALPA. The central criterion in determining whether there is an identity of claims between the first and second adjudications is "whether the two suits arise out of the same transactional nucleus of facts." Costantini v. Trans World Airlines, 681 F.2d 1199, 1201- 02 (9th Cir.1982) (setting forth test for identity of claims); see also Hawaiian Tel. Co. v. Public Utils. Comm'n, 827 F.2d 1264 (9th Cir.1987). Recognizing the possibility of litigation over a new weight policy, the district court in ALPA explicitly stated that it was not passing on the validity of any weight standards United might adopt in the future. Because United changed its weight tables and weight policy in 1980 as part of the post- judgment settlement, we hold that plaintiffs' claims in this case do not arise from the "same transactional nucleus of facts" underlying the claims in ALPA.

Third, notice in ALPA was not sufficient under Rule 23 to preclude monetary claims in later suits, for the class in ALPA was certified and given notice as a Rule 23(b)(2) "injunction" class action. The present suit, by contrast, is a Rule 23(b)(3) "damages" class action. Rule 23(c)(2) requires a higher standard of notice for a Rule 23(b)(3) class action, under which individual notice must be provided to "all members who can be identified through reasonable effort." See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). Further, all potential members in a Rule 23(b)(3) class must be allowed to opt out of the class. In a Rule 23(b)(2) class action, by contrast, there is no requirement for individualized notice beyond that required by due process, and class members are not allowed to opt out. We are unable to determine on the record before us whether the notice given in ALPA was distributed to all class members who would have been entitled to notice of a

Rule 23(b)(3) class action. However, we do know that class members in ALPA could not opt out of the class. Under Eisen, class members in a Rule 23(b)(3) class may be bound to the result of that action only if the notice and opt-out requirements applicable to Rule 23(b)(3) actions are satisfied. Because ALPA did not satisfy the requirements applicable to a Rule 23(b)(3) class action, ALPA cannot preclude the Rule 23(b)(3) class action in this case.

Fourth, to the degree that United seeks to rely on the post-judgment settlement in ALPA, we need only point out that the settlement is not incorporated into a judgment and therefore cannot have preclusive effect. See Hydranautics v. FilmTec Corp., 204 F.3d 880, 885 (9th Cir.2000). But even if it were a judgment, we cannot know whether it sufficiently protected the interests of the unnamed class members as that class then existed. A class action settlement can be approved and entered as a judgment only after a proceeding under Rule 23(e) at which unnamed class members are invited to express their opinions of the proposed settlement. Such a proceeding, often called a "fairness hearing," is designed to protect the unnamed members of the class against the misjudgment (and, occasionally, the self-interest) of the named plaintiffs and class attorneys. We are simply not allowed to give preclusive effect to a post-judgment settlement that was never subjected to the scrutiny contemplated by Rule 23(e) and never entered as a judgment.

Finally, we note that the terms of the settlement in ALPA appear not to protect the interests of flight attendants, such as plaintiffs in this case, who might later have been subjected to discipline for failing to comply with United's post-settlement weight restrictions.[6] The class representatives in ALPA

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[6] In response to plaintiffs' argument that the class members have changed over the 20 years since the ALPA decision, the district court noted that the class certified in ALPA included all future flight attendants and cited

failed to appeal the district court's decision that United's weight policy did not facially discriminate on the basis of sex. They elected, instead, to accept reinstatement and back pay for the members of the class who had been subjected to discriminatory application of the 1977 weight policy. Female flight attendants who were then employed and had not previously been adversely affected by the weight limits, but who might have been so affected in the future, had an interest in appealing the district court's order on the legality of United's policy. Those flight attendants had no interest in obtaining reinstatement and back pay. Similarly, women not then employed (but later hired) as flight attendants by United had no interest in back pay or reinstatement. Consequently, when the class representatives chose not to appeal the adverse ruling on the facial validity of the weight policy, they abandoned any representation of the interests of those present and potential future class members in order to protect present class members seeking back pay and reinstatement.[7] See Tice v. American Airlines, 162 F.3d 966, 969 (7th Cir.1999), cert. denied, 527 U.S. 1036, 119 S.Ct. 2395, 144 L.Ed.2d 795 (1999) (refusing to give preclusive effect to

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NAACP v. Los Angeles Unified Sch. Dist., 750 F.2d 731, 741 (9th Cir.1984). We stated in NAACP v. Los Angeles that "[a] judgment on behalf of a class binds all persons belonging to the class and all those who subsequently come into the class." Id. But in that case the plaintiffs did not assert that they had been inadequately represented by the class representatives in the earlier action. See id. Concerns about the adequacy of representation are heightened where the first action was a class action in which the plaintiffs in the subsequent action were unnamed, absent members. See Hiser v. Franklin, 94 F.3d 1287, 1293 (9th Cir.1996).

[7] Named plaintiffs Leslie Frank, Pat Parnell, Carole Kirk, Joan Balla Weaver, and Donna Durkin had been employed by United for several years prior to the ALPA decision, but there is no evidence that they benefitted from the ALPA settlement, received notice of the settlement, or had an opportunity to object to the terms of the settlement.

prior class action because plaintiffs had been too young to join in earlier litigation and their interests had diverged from those of the earlier class representatives insofar as younger pilots would benefit from age discrimination against older pilots); Rutherford v. City of Cleveland, 137 F.3d 905, 910 (6th Cir.1998) (holding decision to abandon opposition to consent decree governing hiring in exchange for amendment to consent decree governing promotion demonstrated failure to adequately represent interests of applicants); Gonzales v. Cassidy, 474 F.2d 67 (5th Cir.1973) (holding failure to appeal denial of retroactive relief constituted inadequate representation). Because the interests of the plaintiff class in this suit were not adequately represented by the plaintiffs in ALPA, we cannot give preclusive effect in this suit to the post-judgment settlement in ALPA.

United contends in a two-sentence footnote in its brief to this court that even if plaintiffs' challenge to United's weight policy is not barred by claim preclusion, it is barred by issue preclusion. United is correct in stating that "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." Montana v. United States, 440 U.S. 147, 153, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979). But the requirements of identity of parties, identity of the factual claim or issue, adequate notice, and adequate representation apply to both claim and issue preclusion. See Richards v. Jefferson County, Ala., 517 U.S. 793, 800-01, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996) (setting forth due process requirements for granting prior judgment preclusive effect); Hansberry v. Lee, 311 U.S. 32, 42-43, 61 S.Ct. 115, 85 L.Ed. 22 (1940) (same). The particulars of those requirements are different in claim preclusion and issue preclusion, but the underlying ideas are substantially the same. Because United

does not and, indeed, could not, seriously argue that issue preclusion applies on the facts of this case, we think it unnecessary to analyze the question at length.

We therefore proceed to the merits of plaintiffs' claims.

IV

Title VII makes it unlawful "to discriminate against any individual with respect to... compensation, terms, conditions, or privileges of employment, because of such individual's... sex...." 42 U.S.C. § 2000e-2(a)(1). Courts have recognized two bases on which plaintiffs may proceed: disparate treatment and disparate impact. See International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). Disparate treatment arises when an employer "treats some people less favorably than others because of their ... sex." Id. Disparate impact arises when an employer's practice is "facially neutral ... but ... in fact fall[s] more harshly on one group than another." Id. Disparate treatment is permissible under Title VII only if justified as a bona fide occupational qualification ("BFOQ"). A BFOQ is a qualification that is reasonably necessary to the normal operation or essence of an employer's business. See 42 U.S.C. § 2000e-2.

An employer's policy amounts to disparate treatment if it treats men and women differently on its face. For example, in UAW v. Johnson Controls, 499 U.S. 187, 111 S.Ct. 1196, 113 L.Ed.2d 158 (1991), defendant Johnson Controls barred fertile women, but not fertile men, from jobs entailing high levels of lead exposure. The Court concluded this was disparate treatment: "Johnson Controls' policy is not neutral because it does not apply to the reproductive capacity of the company's male employees in the same way as it applies to that of the females." Id. at 199-200, 111 S.Ct. 1196. The Court has made it clear that such an "explicit gender-based

policy is sex discrimination under § 703(a) [of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)] and thus may be defended only as a BFOQ." Id. at 200, 111 S.Ct. 1196.

Similarly, in Healey v. Southwood Psychiatric Hosp., 78 F.3d 128 (3d Cir.1996), defendant Southwood Psychiatric Hospital explicitly treated men and women differently in scheduling its employees' shifts. The court held that "Southwood's gender-based policy is not a pretext for discrimination--it is per se intentional discrimination." Id. at 131. "When open and explicit use of gender is employed ... the systematic discrimination is in effect 'admitted' by the employer, and the case will turn on whether such overt disparate treatment is for some reason justified under Title VII. A justification for overt discrimination may exist if the disparate treatment is ... based on a BFOQ." Id. at 132. The court in Healey held that facial discrimination was permissible as a BFOQ because staffing both males and females on all shifts was necessary to provide the therapeutic care that was the "essence" of the hospital's business. See id. at 132-33.

We view plaintiffs' case as analytically indistinguishable from Johnson Controls and Healey. The uncontroverted evidence shows that United chose weight maximums for women that generally corresponded to the medium frame category of MetLife's Height and Weight Tables. By contrast, the maximums for men generally corresponded to MetLife's large frame category. The bias against female flight attendants infected United's weight maximums for all age groups.[8] Because of this consistent difference in

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[8] The weight maximums that applied to female flight attendants under age 34 all fell within MetLife's range for medium-framed women. By contrast, the weight maximums that applied to males under age 34 all fell within MetLife's range for large-framed men. The weight maximums for

treatment of women and men, we conclude that United's weight policy between 1980 and 1994 was facially discriminatory.[9]

On its face, United's weight policy "applie[d] less favorably to one gender." Gerdom v. Continental Airlines, 692 F.2d 602, 608 (9th Cir.1982) (en banc). Under United's policy, men could generally weigh as much as large-framed men whether they were large-framed or not, while women could generally not weigh more than medium-framed women. As we held in Gerdom, "[w]here a claim of discriminatory treatment is based upon a policy which on its face applies less favorably to one gender ... a plaintiff need not otherwise establish the presence of discriminatory intent." Id.

United defends its weight tables as permissible "grooming" or appearance standards. It is true that not all sex-differentiated appearance standards constitute disparate treatment that must be justified under Title VII as BFOQs. An appearance standard that imposes different but essentially equal burdens on men and women is not disparate treatment.

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female flight attendants between 35 and 44 straddled the medium and large frame categories for women, while the weight maximums for male flight attendants between the same ages fell exclusively in the large frame category for men. Female flight attendants between 45 and 54 were subjected to weight maximums that fell barely into the large frame category for women. These maximums never exceeded the top of the medium frame range for women by more than three pounds. Their male counterparts the same age were subjected to maximums at the upper end and beyond the upper end of MetLife's large frame range for men. These maximums exceeded the maximum weight for medium frames for men by anywhere between 4 and 17 pounds; for men 5'11" or taller, the maximums exceeded MetLife's large frame range for men.

[9] Plaintiffs also make a disparate impact challenge to the weight maximums. Because we hold that plaintiffs are entitled to summary judgment on their disparate treatment claim, we do not reach the merits of their disparate impact claim.

For example, in Fountain v. Safeway Stores, Inc., 555 F.2d 753 (9th Cir.1977), we held that a store may impose different hair length requirements on men and women, and may require men but not women to wear neckties. As we wrote in that case, "regulations promulgated by employers which require male employees to conform to different grooming and dress standards than female employees is not sex discrimination within the meaning of Title VII." Id. at 754.

We need not decide whether a rule or regulation that compels individuals to change or modify their physical structure or composition, as opposed to simply presenting themselves in a neat or acceptable manner, qualifies as an appearance standard. Even if United's weight rules constituted an appearance standard, they would still be invalid. A sex- differentiated appearance standard that imposes unequal burdens on men and women is disparate treatment that must be justified as a BFOQ. Thus, an employer can require all employees to wear sex-differentiated uniforms, but it cannot require only female employees to wear uniforms. See Carroll v. Talman Fed. Sav. & Loan Ass'n of Chicago, 604 F.2d 1028 (7th Cir.1979). An airline can require all flight attendants to wear contacts instead of glasses, but it cannot require only its female flight attendants to do so. See Laffey v. Northwest Airlines, Inc., 366 F.Supp. 763 (D.D.C.1973); see also Nadine Taub, Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination, 21 B.C. L.Rev. 345, 387 (1980).

We also need not consider whether separate weight standards for men and women in themselves constitute discriminatory treatment under Johnson Controls. Even assuming that United may impose different weight standards on female and male flight attendants, United may not impose

different and more burdensome weight standards without justifying those standards as BFOQs.

United is thus entitled to use facially discriminatory weight charts only if it can show that the difference in treatment between female and male flight attendants is justified as a BFOQ. See Johnson Controls, 499 U.S. at 200, 111 S.Ct. 1196; Healey, 78 F.3d at 131. The burden is on United to show that its weight policy fits in this "extremely narrow exception to the general prohibition of discrimination on the basis of sex." Dothard v. Rawlinson, 433 U.S. 321, 334, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977). To escape summary judgment, United must raise a genuine issue as to whether its discriminatory weight maximums are "reasonably necessary" to the "normal operation" of its "particular business," and that they concern job-related skills and aptitudes. Johnson Controls, 499 U.S. at 187, 111 S.Ct. 1196; 42 U.S.C. § 2000e-2(e)(1).

United provided no evidence that its facially discriminatory weight standard is a BFOQ. United made no showing that having disproportionately thinner female than male flight attendants bears a relation to flight attendants' ability to greet passengers, push carts, move luggage, and, perhaps most important, provide physical assistance in emergencies. The only evidence in the record is to the contrary. Far from being "reasonably necessary" to the "normal operation" of United's business, the evidence suggests that, if anything, United's discriminatory weight requirements may have inhibited the job performance of female flight attendants. We therefore reverse the decision of the district court and hold that because United's policy of applying medium- frame weight maximums to female flight attendants and large-frame weight maximums to male flight attendants is facially discriminatory and not justified as a

BFOQ, plaintiffs are entitled to summary judgment on their disparate treatment class claim.[10]

V

The ADEA prohibits employers from discriminating against "any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age." 29 U.S.C. § 623(a)(1). The district court correctly concluded that a disparate treatment class claim is not available to plaintiffs because United's weight policy discriminated on the basis of sex and weight, not on the basis of age. An employer does not violate the ADEA by discriminating based on a factor that is merely empirically correlated with age. See Hazen Paper Co. v. Biggins, 507 U.S. 604, 609-11, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993); Ellis v. United Airlines, Inc., 73 F.3d 999 (10th Cir.1996) (concluding that United's weight requirement did not violate ADEA).

Plaintiffs should, however, be permitted to go forward with their age discrimination class claim under a disparate impact theory.[11] In its order of February 26, 1997, the district court noted that it had previously found, on August 16, 1995, that plaintiffs' age-based disparate impact claim presented triable issues of fact. But the district court concluded that the Supreme Court's decision in Hazen, as interpreted by the Tenth Circuit in Ellis in 1996, foreclosed a disparate impact claim in an ADEA case. We have since squarely decided

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[10] We also reverse the district court's implicit denial of summary judgment on plaintiffs' corresponding discrimination claim under FEHA.

[11] United contends that plaintiffs have waived their ADEA class claims of age discrimination on appeal. We disagree. An appellant ordinarily must raise an argument in its opening brief on appeal in order to preserve it for our review. See, e.g., Officers for Justice v. Civil Serv. Comm'n, 979 F.2d 721, 726 (9th Cir.1992). Plaintiffs have satisfied this standard in sections VI.C.5.e and VI.D of their opening brief.

that a disparate impact claim is cognizable in an ADEA case. See Arnett v. California Pub. Employees Retirement Sys., 179 F.3d 690, 696 (9th Cir.1999) vacated and remanded on other grounds, --- U.S. ----, 120 S.Ct. 930, 145 L.Ed.2d 807 (2000). The Supreme Court vacated our decision in Arnett and remanded for further consideration in light of Kimel v. Florida Bd. of Regents, 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000), in which the Court held that the ADEA does not abrogate the Eleventh Amendment. The Eleventh Amendment issue is irrelevant to a case, such as this one, in which a private rather than state entity is a defendant, and the Court's vacation of our decision has no bearing on the correctness of our conclusion that a disparate impact claim is cognizable under the ADEA. We see no reason to depart from our conclusion in Arnett and we again hold that a disparate impact claim is cognizable under the ADEA. See also EEOC v. Local 350, Plumbers and Pipefitters, 998 F.2d 641, 648 n. 2 (9th Cir.1992). We therefore conclude that plaintiffs should be allowed to proceed with their disparate impact class claim.[12]

VI

The district court concluded that none of the named plaintiffs presented viable individual claims of discrimination under Title VII, the ADEA, the ADA, and FEHA. In light of our holding on the class claim under Title VII, we reverse summary judgment for defendant on named plaintiffs' individual claims of sex discrimination. Similarly, in light of our holding on the class claim under the ADEA, we reverse summary judgment on named plaintiffs' individual claims of age discrimination. On remand, the district court should reassess their individual claims under

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[12] We also reverse the district court's implicit dismissal of plaintiffs' corresponding age discrimination claim under FEHA.

Title VII and the ADEA and their corresponding individual claims under FEHA in light of this opinion.

We affirm the district court's decision granting summary judgment for United on named plaintiffs' individual claims under the ADA and their corresponding claims under FEHA. The district court correctly concluded that none of the named plaintiffs presented evidence to make a prima facie case that their eating disorders "substantially limited" a major life activity and were therefore disabilities within the meaning of the ADA. See Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 119 S.Ct. 2162, 2169, 144 L.Ed.2d 518 (1999). A major life activity is a function such as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2. While eating disorders can substantially limit major life activities, plaintiffs have not presented evidence that their eating disorders have that effect.

With respect to the named plaintiffs' other asserted disabilities, the district court correctly concluded that none of the named plaintiffs had exhausted their administrative remedies by filing charges with the EEOC or with California's Department of Fair Employment and Housing. Named plaintiffs did file charges claiming disability discrimination based on obesity, but obesity is not like or reasonably related to other conditions, such as cancer, from which plaintiffs allegedly suffer and on which they base their other individual charges of discrimination. Named plaintiffs have therefore not exhausted their administrative remedies with respect to these conditions. See Yamaguchi v. United States Dep't of the Air Force, 109 F.3d 1475, 1480 (9th Cir.1997).

VII

Because the district court should have granted summary judgment to plaintiffs on their Title VII disparate treatment class claim and should have denied United's motion for summary judgment on plaintiffs' disparate impact ADEA class claim, we reverse the district court's decertification of the class and denial of plaintiffs' application for an award of costs.

CONCLUSION

For the foregoing reasons, we REVERSE the district court's grant of summary judgment to defendant on plaintiffs' disparate treatment class claim under Title VII, and we REVERSE its denial of plaintiffs' motion for summary judgment on that claim. We AFFIRM the district court's grant of summary judgment on plaintiffs' disparate treatment class claim under the ADEA, and we REVERSE its grant of summary judgment to defendant on plaintiffs' disparate impact class claim under the ADEA. We similarly REVERSE and AFFIRM the district court's rulings on plaintiffs' class claims under FEHA that correspond to their class claims under Title VII and the ADEA. We REVERSE the district court's grant of summary judgment to defendant on plaintiffs' individual claims under Title VII, the ADEA, and corresponding claims under FEHA. We AFFIRM the district court's grant of summary judgment to defendant on plaintiffs' individual claims under the ADA and corresponding claims under FEHA. We REVERSE the district court's class decertification and denial of plaintiffs' application for award of costs in the district court.

REVERSED in part, AFFIRMED in part, and REMANDED for further proceedings consistent with this opinion. Each party shall bear its own costs on appeal.

O'SCANNLAIN, Circuit Judge, concurring in part and dissenting in part:

I fully concur in the court's affirmance of the district court's summary judgment for United on the plaintiffs' "disparate treatment" claims under the Age Discrimination in Employment Act and individual claims under the Americans with Disabilities Act. I must respectfully dissent, however, from the reversal of the district court's grant of summary judgment for United on the plaintiffs' remaining claims under Title VII and the Age Discrimination in Employment Act.[1]

I

Although the majority deploys a raft of arguments in the alternative to support its holding that the plaintiffs' facial attack on United's weight policy is not precluded by the judgment entered in Air Line Pilots Association, International v. United Air Lines, Inc. ("ALPA "), 26 F.E.P. Cases 607, 1979 WL 34 (E.D.N.Y.1979), none of those arguments is compelling--indeed, some of them conflict fundamentally with preclusion doctrine, in my view.[2]

A

The majority's first two arguments against granting the ALPA judgment preclusive effect in this litigation are that the relevant claim under Title VII of the Civil Rights Act of

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[1] I shall not separately address the plaintiffs' claims under the California Fair Employment and Housing Act ("FEHA"), Cal. Gov't Code §§ 12900-12996, but would affirm the district court's judgment thereon for the reasons that follow

[2] The majority suggests that the issue is whether the "post- judgment settlement," as opposed to the actual district court judgment in ALPA, precludes these claims. See supra at 852 (rejecting United's argument "to the degree that [it] seeks to rely on the post-judgment settlement in ALPA " because the settlement was not incorporated into the district court's judgment and did not protect the interests of absent class members). The post-judgment settlement is not relevant to the preclusion issue here. It is undisputed that the district court tendered a final judgment in ALPA, and it is the preclusive effect of that judgment that is before us.

1964 ("Title VII"), 42 U.S.C. § 2000e, did not "arise" until after 1979 (i.e., after that judgment was entered), supra at 850, and that "the claim is based on a different weight policy from that challenged in ALPA," supra at 851.

As an initial matter, these two contentions seem to me to be part and parcel of the same argument. The claim did not "arise" before 1979 either because the ALPA plaintiffs did not think (or bother) to make it before then or because the distinct factual circumstances--United's implementation of its new weight policy--did not obtain before then. If the majority's reference to the "arising" of the plaintiffs' claim is captured by the second possible reading, the majority's first two arguments are logically indistinguishable.

It is plain that the first possibility cannot militate against giving the ALPA judgment preclusive effect, notwithstanding the decontextualized dictum from International Technologies Consultants, Inc. v. Pilkington, PLC, 137 F.3d 1382, 1388 (9th Cir.1998), that the majority quotes for the overstated proposition that prior favorable judgments do not "preclude claims based on events occurring [there]after." See supra at 851 (" 'By winning the first action, the defendants "did not acquire immunity in perpetuity from the antitrust laws." ' "). As the very purpose of preclusion doctrine "is to protect a defendant from being worn down by a plaintiff who sues him over and over again for the same allegedly wrongful conduct," Marrese v. American Acad. of Orthopedic Surgeons, 726 F.2d 1150, 1152 (7th Cir.1984), rev'd on other grounds, 470 U.S. 373, 105 S.Ct. 1327, 84 L.Ed.2d 274 (1985), someone who has once successfully defended his allegedly obnoxious behavior in court is indeed presumptively immune from suit thereon (by the same parties) though he should persist in his offensive behavior thereafter. Cf. Go-Video, Inc. v. Matsushita Elec. Indus. Co. (In re Dual-Deck Video Cassette Recorder Antitrust Litig.),

11 F.3d 1460, 1464 (9th Cir.1993) (giving prior judgment preclusive effect because the subsequent claim appeared to rely on the misplaced theory "that every day is a new day, so doing the same thing today as yesterday is distinct from what was done yesterday.").

It is conceivable, of course, that United's new weight policy might avoid the preclusive effect of the ALPA judgment even though the mere passage of time could not. "Material operative facts occurring after the decision of an action with respect to the same subject matter may in themselves ... comprise a transaction which may be made the basis of a second action not precluded by the first." Restatement 2d of Judgments § 24 cmt. a; see Costantini (Cite as: 216 F.3d 845, *859) v. Trans World Airlines, 681 F.2d 1199, 1202 (9th Cir.1982) (noting that "whether the two suits arise out of the same transactional nucleus of facts" is "the most important" criterion in determining whether the judgment in an earlier lawsuit precludes litigation of a second). The majority summarily concludes that United's new weight policy is in fact a distinct transaction because it was "part of the post-judgment settlement" reached after ALPA. Like the district court, I think it plain that an across-the-board increase in maximum permissible weights and relaxed standards for older flight attendants does not amount to a "[m]aterial operative fact[ ]" with respect to an allegation that those maxima are sexually discriminatory. In order for uniform, absolute increases--which is essentially all that is "new" on the face of United's post-1979 weight policy--to be relevant to a discrimination claim, the margin of the increase itself must be more or less accommodating to one gender than another. Such a claim has not been made in the course of this litigation and is not credible on its face. The lockstep increases in maximum permissible weights, in short, are no more material to the plaintiffs' cause of action

than the possibility that the new policy was printed and circulated on a different color of paper.

The fact that the plaintiffs' Title VII claims in this case arise from United's new weight policy rather than its predecessor is not material to a claim of sex discrimination because the new policy does not differ from the old one in any way that is itself material to the plaintiffs' claim. Thus the fact that the policy was changed after the ALPA judgment cannot alone defeat that judgment's preclusive effect. Cf. EEOC v. American Airlines, Inc., 48 F.3d 164, 169 (5th Cir.1995) ("It is not enough to avoid the preclusive effect of the prior determination ... to show merely a change in facts: a change must have occurred in facts that ... were of controlling significance."). To hold otherwise, as the court does today, cabins preclusion doctrine so narrowly as to render it useless, for a plaintiff hoping to evade it might do so simply by emphasizing irrelevant distinctions in his pleadings.[3]

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[3] The plaintiffs take some pains to argue that this lawsuit cannot be barred by "claim preclusion," as the district court held, as distinct from "issue preclusion." Even if that were so, "we may affirm the district court's decision based on any reason finding support in the record," Welch v. Fritz, 909 F.2d 1330, 1330 (9th Cir.1990), and it is apparent that "issue preclusion" would suffice to preclude the present lawsuit. This is so notwithstanding the plaintiffs' attempt to distinguish the judgment in ALPA as being limited to a disparate impact theory rather than the disparate treatment theory that is at issue in this case. It is an exercise in fruitless abstractions to hypothesize that one could recover under a disparate treatment theory relying on evidence of a pattern or practice after failing to recover under a disparate impact theory. Cf. Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988). The distinguishing features of the factual issues that typically dominate in disparate impact cases do not imply that the ultimate legal issue is different than in cases where disparate treatment analysis is used. Nor do we think it is appropriate to hold a defendant liable for unintentional discrimination on the basis of less evidence than

B

The majority's third argument against granting preclusive effect to the judgment entered in ALPA is that the procedural protections for absent class members in that litigation were insufficient to bar the individual claims of those absent class members for monetary relief. In particular, the majority notes that the ALPA court certified the plaintiff class in that case under Fed.R.Civ.P. 23(b)(2), which applies to actions predominantly for declaratory and injunctive relief and does not require the same level of procedural protections for absent class members that a "damages" action brought by a class certified under Fed.R.Civ.P. 23(b)(3) has. See supra at 851. In a class action under Rule 23(b)(3), "the court [must] direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort," and this notice must indicate that members of the class may opt out of the litigation to avoid being bound by its result. Fed.R.Civ.P. 23(c)(2); see Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). The Supreme Court has declared that the protections mandated for classes certified under Rule 23(b)(3) are "an

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is required to prove intentional discrimination. Rather, the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination. Id. at 987, 108 S.Ct. 2777 (citation omitted). Furthermore, plaintiffs' suggestion that the judgment in ALPA disposed of only a disparate impact claim and not a disparate treatment claim is unsupported by anything but a citation to United's statement that "Judge Pratt conducted what was indisputably a disparate impact analysis." Judge Pratt may well have recognized that conducting a disparate impact analysis on the type of facial challenge there at issue disposed of any disparate treatment claim as well. This recognition would explain the plaintiff's apparent contention in this case that Judge Pratt did not effectively distinguish between disparate impact and disparate treatment claims.

unambiguous requirement of Rule 23" in order "to insure that the judgment ... w[ill] bind all class members who did not request exclusion from the suit." Id. at 176, 94 S.Ct. 2140. From the Court's observation, the majority apparently infers that only judgments relating to classes certified under Rule 23(b)(3) can have preclusive effect--at least with respect to claims for damages. There are two problems with the majority's inference.

The first problem is that the inference is logically untenable and manifestly unfounded. Strictly as a matter of logic, the mere fact that the critical notice and opt-out protections are mandatory for classes certified under Rule 23(b)(3) does not mean that the same protections were unavailable to a class certified under Rule 23(b)(2). Indeed, four years before it entered judgment in ALPA, the Federal District Court for the Eastern District of New York had held that protections entailed by Rule 23(b)(3) certification should be extended to classes certified under Rule 23(b)(2) when, as in the ALPA litigation, the plaintiffs seek significant monetary as well as equitable relief. See Gates v. Dalton, 67 F.R.D. 621, 632-33 (E.D.N.Y.1975) (holding that it was immaterial whether the plaintiff class was certified under Rule 23(b)(2) or Rule 23(b)(3), because, "in view of the reimbursement claim, notice to the class and an opportunity to 'opt-out' must be provided in any event. That, as noted, is the only real practical difference between the two designations...."). We and other circuits have also recognized that a judgment entered against a class certified under Rule 23(b)(2) may satisfy the demands of due process and bind the members of that class as though it had been certified under Rule 23(b)(3) and lost "a class action suit for money damages." Crawford v. Honig, 37 F.3d 485, 487 n. 2 (9th Cir.1994) (noting that the case "was a class action for injunctive relief certified under Fed.R.Civ.P. 23(b)(2), which

does not require notice or permit members to opt out, although a court in its discretion may provide for an opt-out or notice."); see Fontana v. Elrod, 826 F.2d 729, 732 (7th Cir.1987) (acknowledging that, "when monetary damages are sought in a(b)(2) class action, 'due process does require notice before the individual monetary claims of absent class members may be barred.' "); Johnson v. General Motors Corp., 598 F.2d 432, 437 (5th Cir.1979) ("[W]e have previously suggested that when both monetary and injunctive relief are sought in an action certified under Rule 23(b)(2), notice may be mandatory if absent class members are to be bound.").

It is of course true that the members of the plaintiff class in this case may not have enjoyed adequate protections as members of the class certified under Rule 23(b)(2) in ALPA, notwithstanding the fact that the ALPA court could very well have extended such protections to them.[4] The fact that the plaintiffs might have been deprived of their due process rights to notice and the opportunity to opt-out, however, cannot bar the normal preclusive effect of the judgment entered in ALPA. This is the second problem with the majority's position. We are not in the habit of presuming violations of due process, especially when, as here, the parties supposedly suffering such a violation have never so

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[4] It bears noting at this juncture that whether these protections were appropriately extended does not depend on the experience of any particular member of the class, because the preclusive effect of a class action depends upon the adequacy of the entire notice scheme and not upon a determination of whether the member of the class to be precluded actually received notice. See, e.g., Fontana, 826 F.2d at 732 (" '[A]n absent class member will be bound by any judgment that is entered if appropriate notice is given, even though that individual never actually received notice.'")(quoting 7B Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 1789, at 253 (2d ed.1986)).

much as alleged the fact thereof. See, e.g., Park v. California, 202 F.3d 1146, 1154 (9th Cir.2000) (rejecting a habeas petitioner's due process claim because he "failed to fulfill his burden adequately to allege and demonstrate ... a violation of due process" despite having both specified the trial court's error and cited "to the Fifth, Ninth, and Fourteenth Amendments"); Howlett v. Salish and Kootenai Tribes of the Flathead Reservation, 529 F.2d 233, 240 (9th Cir.1976) (noting that the plaintiffs bore the burden of demonstrating a violation of due process). Hence, even if it were within the power of this court to establish independently that the ALPA court did not require adequate notice to the members of the plaintiff class in that litigation, the plaintiffs here cannot benefit from this discovery in light of their failure to carry the burden of demonstrating (or even alleging) as much themselves.

C

The majority finally notes that the judgment entered in ALPA cannot have preclusive effect because the named plaintiffs in ALPA settled their claims against United with reinstatement and an award of back pay rather than appealing the ALPA court's adverse judgment, thus proving that the named plaintiffs were insufficiently representative of the absent class members who had not yet been harmed by the weight policy.[5] See supra at 852-53 ("The class

[5] The majority also notes that the preclusive effect of the judgment in ALPA cannot be inferred from the fact that the new weight program was the result of a settlement between United and the plaintiff class in ALPA. See supra at 852 ("Fourth, to the degree that United seeks to rely on the post-judgment settlement in ALPA, we need only point out that the settlement is not incorporated into a judgment and therefore cannot have preclusive effect."). I see no need to address the validity of the majority's observation, for it is irrelevant that United's new weight program was the result of a settlement between the ALPA parties except insofar as it clearly establishes that the changes in United's weight policy could not

representatives in ALPA failed to appeal the district court's decision that United's weight policy did not discriminate on the basis of sex."). The district court in this case held that the plaintiff class in ALPA included, as the ALPA court had indicated, all former, present, and future flight attendants at United and cited our decision in NAACP v. Los Angeles Unified School District, 750 F.2d 731, 741 (9th Cir.1984), for the proposition that class actions may bind even future members of the class. The majority declares NAACP inapplicable, because "the plaintiffs [in that case] did not assert that they had been inadequately represented by the class representatives in the earlier action." Supra at 852 n. 6.

The problem with the majority's handy point is that the plaintiffs in this case have also failed to assert that they were inadequately represented. To the extent that the majority infers the critical allegation from arguments made by the plaintiffs here, the majority ignores our previous admonition that "we will not second-guess a prior decision that counsel adequately represented a class" and our recognition that the burden is squarely on the plaintiffs to "present facts which indicate a lack of adequate representation." Brown v. Ticor Title Ins. Co., 982 F.2d 386, 390-91 (9th Cir.1992). The plaintiffs have simply waived the "inadequate representation" argument here, and thus it too cannot strip the judgment in ALPA of its preclusive effect.

D

For the foregoing reasons, I dissent from the majority's refusal to acknowledge that the ALPA judgment precludes the plaintiffs' facial attack of United's weight policy as

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possibly provide a distinct basis for suit (as those changes were merely concessions sought by the plaintiff class). As the changes to the weight program were immaterial to a Title VII claim on their face, the fact that they were the result of a settlement is neither here nor there.

unlawful sex discrimination under Title VII. I thus believe the majority errs in reaching the merits of the complex Title VII issue. I would only note here that the majority's purported grant of summary judgment for the plaintiffs is unsupportable. It relies on a "finding"--made for the first time here and on the basis of figures for the population at large when the plaintiff class is hardly drawn therefrom--that the evidence establishes that United's weight program is more burdensome for female flight attendants than male flight attendants. The majority's conclusion presses the envelope too far. Cf. Gerdom v. Continental Airlines, Inc., 692 F.2d 602, 608 (9th Cir.1982) (Noting that "[t]he general principle is that the plaintiff has the initial burden of offering evidence which is sufficient to create an inference of intentional discrimination" and holding that evidence that a weight limit was applied only to females was sufficient therefor (emphasis added)).[6]

II

While I concur in the majority's affirmance of the district court's summary judgment for United on the plaintiffs' claims under the Age Discrimination in Employment Act, ("ADEA"), 29 U.S.C. §§ 621-634, insofar as those claims rest on a "disparate treatment" theory, I must dissent from the court's reversal of the district court's summary judgment insofar as the plaintiffs' claims rests on a "disparate impact" theory. Quite simply, the plaintiffs have waived this issue on appeal by failing to offer any argument whatsoever against the district court's decision.

There is no room for doubt that the district court granted summary judgment for United on the plaintiffs' disparate

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[6] As I would affirm the district court's summary judgment on the class claim under Title VII, I would also affirm the district court's summary judgment on individual claims.

impact claims because it concluded that such claims are not cognizable under the ADEA after the Supreme Court's decision in Hazen Paper Co. v. Biggins, 507 U.S. 604, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993). In reversing the district court, the majority contends that we have "squarely decided" since Hazen was handed down that a disparate impact claim is, in fact, cognizable in an ADEA case. Supra at 856. We have "squarely decided" this issue, however, only in the context of a case that is now a legal nullity. See Arnett v. California Public Employees Retirement System, 179 F.3d 690, 697 (9th Cir.1999), vacated, --- U.S. ----, 120 S.Ct. 930, 145 L.Ed.2d 807 (2000). The majority makes much of the fact that Arnett was vacated "on other grounds," see supra at 856 ("The Eleventh Amendment issue [on the basis of which the Supreme Court appears to have vacated Arnett] is irrelevant to a case[ ] such as this one ...."), but the majority's distinction does not alter the fact that Arnett is utterly devoid of legal force. See, e.g., O'Connor v. Donaldson, 422 U.S. 563, 577 n. 12, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975) ("Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect...."); United States v. Munsingwear, Inc., 340 U.S. 36, 39, 71 S.Ct. 104, 95 L.Ed. 36 (1950) (noting that, when a decision is vacated, the path has been cleared "for future relitigation of the issues"). Indeed, we have rebuked litigants for attempting to resurrect vacated decisions on precisely the same logic. See Durning v. Citibank, N.A., 950 F.2d 1419, 1424 n. 2 (9th Cir.1991) ("Although the Authority contends that the decision was 'vacated on other grounds,' we find that contention curious. A decision may be reversed on other grounds, but a decision that has been vacated has no precedential authority whatsoever."). I would require more than a citation to our defunct decision in Arnett before endorsing the conclusion that the district court erred.

That citation, however, is all there is on the issue. The only argument offered by the plaintiffs in opposition to the district court's summary judgment for United on their ADEA claims has nothing at all to do with the appropriateness of disparate impact theories and is instead limited to the all-but-conclusory statement that "the evidence establishes a genuine issue of intentional age discrimination. "In addition to being entirely beside the point, the plaintiffs'"argument" is wholly insubstantial. Even with descriptions of and citations to a few items in the record to support their characterization of the evidence, the plaintiffs manage in the course of more than a hundred pages of briefing to fill less than two with their arguments relating to the ADEA.[7]

I think it somewhat curious to hold, solely on the strength of a perfunctory observation, see supra at 856 ("We see no reason to depart from our conclusion in Arnett ...."), that the district court erred in concluding that a disparate impact claim under the ADEA does not survive Hazen. To do so without any relevant briefing on the issue is worse yet. Because the plaintiffs have manifestly waived their ADEA claims on appeal, I would affirm the district court's summary judgment for United on those claims.

III

Because I cannot agree with the court's reversal of the summary judgment for United, I must also disagree with the reversal of the district court's decertification of the class and denial of plaintiffs' application for costs.

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[7] If there were any lingering skepticism that the plaintiffs have abandoned their disparate impact claims under the ADEA, both the fact that the plaintiffs did not take exception in their reply brief to United's statement to this effect and the fact that the plaintiffs failed to alert us to this court's purportedly dispositive--and decidedly helpful--decision in Arnett, see Fed. R.App. P. 28(j), should put such skepticism to rest.

A

The district court's failure to require notice of the decertification under Fed.R.Civ.P. 23(d)(2) was not an abuse of discretion, because obvious practical considerations militated strongly against requiring notice here. See Bauman v. United States District Court, 557 F.2d 650, 658 (9th Cir.1977) (reviewing requirement of notice pursuant to Fed.R.Civ.P. 23(d)(2) for an abuse of discretion).

First, United had discontinued its weight program four years before the decertification of the class. The simple staleness of the class promised to render the typical unnamed member relatively difficult to locate.

Second, the number of individuals requiring notice would have been disproportionate to the benefits derived from notice. This is particularly true because the supposed benefit from the notice was that members of the class with individual claims were to be informed that their claims were tolled during the pendency of the class action and the claims thus tolled were exactly those that the court had already disposed of. See Crown Cork & Seal Co. v. Parker, 462 U.S. 345, 103 S.Ct. (Cite as: 216 F.3d 845, *864) 2392, 76 L.Ed.2d 628 (holding only that claims identical to those advanced in the putative class action are tolled during the pendency of the class certification).

B

I respectfully disagree as well with the court's reversal of the district court's denial of the plaintiffs' application for costs, because the fact that the district court properly found the plaintiffs' claims to be meritless rendered the plaintiffs' request of an award entirely frivolous. Cf. National Information Servs., Inc. v. TRW, Inc., 51 F.3d 1470, 1471 (9th Cir.1995) (noting that the "loser bears th[e] burden" of

overcoming a presumption that costs will be awarded to the prevailing party in civil litigation under Fed.R.Civ.P. 54(d)).

IV

I would affirm the district court's grant of summary judgment for United on the plaintiffs' Title VII, ADEA, and FEHA claims. Because the majority declines to do so on the strength of dubious arguments never made by the plaintiffs and authority lacking precedential force of any sort, I dissent from that part of the court's disposition. Moreover, because the district court correctly granted summary judgment for United, I dissent from the reversal of the district court's order decertifying the class and denying the plaintiffs' application for costs.

It may seem inappropriate in this day and age to have seemingly arbitrary weight limitations for employees (a proposition with which United seems no longer to disagree), but our anti-discrimination statutes and law of civil procedure rest on policies more diverse than the eradication of business practices that strike us as distasteful or unfair. Those policies include protecting to the extent practicable the flexibility of private enterprise to respond to the demands of the market and protecting individuals from endlessly rehearsing (at potentially crippling expense) their defenses to allegations of unlawful conduct. In order to vindicate these other policies, the courts and Congress have drawn lines limiting what conduct is actionable and under what circumstances an employer may be called upon to defend his conduct. Because the majority ignores those lines, many of them well established, I concur in the court's opinion only in part and dissent as to the remainder.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OFCALIFORNIA

No. C-92-0692-CAL

LESLIE FRANK, *et al.*,

Plaintiffs,

v.

UNITED AIRLINES, INC.,

Defendant.

February 26, 1997,

ORDER ON DEFENDANT'S MOTIONS

Four motions by defendant are presently before the court for decision. They are defendant's motions: for summary judgment on plaintiffs' class-wide disparate treatment claims; to decertify those class claims; for summary judgment on plaintiffs' age discrimination claims; and for summary judgment on the age discrimination claims of certain opt-in plaintiffs.

I.

There have been extensive prior motions and orders. A brief review of some is necessary in order to define the claims of plaintiffs that are now pending and the scope of the evidentiary record.

Pursuant to stipulation, an order for class certification was entered on April 29, 1994. As a result of numerous motions, this court issued an order on August 16, 1995 ruling on certain issues and defining the issues remaining for trial. This court will not here restate its reasons for the decisions made in that order, but will simply note what those decisions were, because they are necessary to define the present status of this case. The order noted that this case alleges four types of discrimination with respect to defendant's weight program for its flight attendants:[1] gender, age, handicap-disability, and race. The court concluded that plaintiffs' gender discrimination claims were barred by res judicata, except for their claims that defendant's weight program has been applied in a discriminatory manner. The court stated that this "as applied" claim must be analyzed under the principles of disparate treatment. The court held that plaintiffs' age discrimination claims were not barred by res judicata. This court then defined plaintiffs' remaining claims as follows (order, pg. 14 lines 15-22):

> (1) Gender discrimination insofar as plaintiffs allege that defendant's weight program is applied in a discriminatory manner. The court believes that this must be analyzed under disparate treatment theory. (2) Age and race discrimination, under both disparate impact and disparate treatment analyses. (3) Handicap-disability discrimination under the elements of the [ADA] statute.

That order also made certain procedural decisions and set a further schedule for pretrial proceedings and for trial. On February 6, 1996 this court issued a further procedural order bifurcating and setting trials on the remaining issues. The

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[1] Defendant terminated the weight program in July 1994. It also suspended application of the program from October 1992 to late 1992 or early 1993.

order also set the first trial for October 1996, and scheduled other pretrial procedures.

The February 1996 order was, however, followed by serious discovery disputes. For purposes of the present motions, the court need only note that a March 1, 1996 order compelled plaintiffs to respond further to defendant's interrogatories and depositions. When plaintiffs did not comply with that order, this court issued an order on May 31, 1996. The court there ordered, in summary, that unnamed class members whose identity had not previously been disclosed to defendant in discovery could not provide testimony at trial, and no evidence of events which occurred to them could be presented at trial.

Defendant then made the motions which are now before the court. Pending resolution of those motions, this court vacated the trial and pretrial dates[2].

As a result of those prior proceedings, plaintiffs have the following claims remaining:

1. Gender discrimination "as applied," to be analyzed under a disparate treatment theory. This is a class claim.[3]

2. Age discrimination, under both disparate impact and disparate treatment analyses. This is also a class claim.[4]

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[2] That vacation was because of these motions, but also because of the court's crowded trial docket of criminal cases and civil cases with a higher priority.

[3] The class claims are subject to the evidentiary limitations stated in the order of May 31, 1996.

[4] Also subject to the evidentiary limitations stated in the order of May 31, 1996.

3. Race discrimination, under both disparate impact and disparate treatment analyses, which is not a class claim.

4. Handicap-disability discrimination, under the ADA and the California FEHA,[5] also not a class claim.

II.

In the four motions presently before the court, defendant first seeks summary judgment on the class gender and class age discrimination claims. Defendant contends that plaintiffs do not have sufficient evidence of class wide discrimination in the application of defendant's weight program. This motion must meet the standard of Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v. Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Second, defendant argues that if there are genuine issues of material fact to preclude such a summary judgment, the class should be decertified. The contention is that the evidence has demonstrated that plaintiffs' claims require individualized case-by-case assessments, primarily on why weight exceptions were or were not granted for each female flight attendant who applied for one. This motion requires a Rule 23 analysis. Third, further as to the age discrimination claims, defendant moves for summary judgment on the grounds that: plaintiffs have no evidence to support their disparate treatment age claims,[6] and their disparate impact age claims cannot proceed because of recent case law.[7] And fourth, defendant moves for summary judgment on the age discrimination claims of certain opt-in plaintiffs who

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[5] This court's order of August 16, 1995, omitted reference to the California FEHA.

[6] This ground must meet the standards of FRCP and Celotex.

[7] This ground presents an issue of law.

allegedly suffered no wage losses. This motion is based on the arguments that plaintiffs who were not terminated or removed cannot recover damages, and that there is no claim remaining for declaratory or injunctive relief because defendant has terminated its weight program. The issues in this fourth motion are ones of law.

Extensive briefs and factual records were submitted in support of and in opposition to the motions. The motions were argued over a period of several days, and were submitted for decision. This court has reviewed the very extensive fact records, the moving and opposing briefs, the arguments of counsel, and the applicable authorities.

III.

As stated, this court has previously concluded that the analysis of defendant's weight program for alleged gender discrimination must be an "as applied" analysis. That analysis must be under a disparate treatment theory, which requires a showing of intentional discrimination. Insofar as the age discrimination and race discrimination claims also involve disparate treatment analysis, there must be the same showing of intentional discrimination. In this case, the "as applied" claims have now come down to a question of the grant or denial of weight exceptions to female flight attendants. Plaintiffs now define their "as applied" class discrimination claims as follows (plaintiffs' opposition to defendant's motions, dated July 17, 1996, pages 1 and 7):

Plaintiffs' sex and age discrimination claims focus on defendant's liability for a pattern and practice of discrimination in the standards and criteria [defendant's] flight surgeons used in evaluating flight attendants for 'weight exceptions.' 'Weight exceptions' or 'medical exceptions' as they were sometimes called, increase the standardized weight maximum imposed on all flight

attendants .... Discrimination issues[] are raised by preferential treatment of men in the amount and duration of weight exceptions and in the standards used for defining 'medical conditions' which justified weight exceptions.

The parties agree that this is an alleged "pattern and practice" of discrimination against the plaintiff class members on the basis of sex or age. The standard for evaluating such a pattern and practice claim was defined by the United States Supreme Court in Teamsters v. United States, 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977). The Court said that in order to prevail in a pattern and practice case, plaintiffs must prove more than the mere occurrence of isolated or accidental or sporadic discriminatory acts; Id. at 336. Plaintiffs must instead establish by a preponderance of the evidence that discrimination was the company's standard operating procedure -- the regular rather than the unusual practice; Id. In order to establish such a prima facie case, plaintiffs must usually rely on a combination of statistical and anecdotal proof. In the presentation of statistical evidence, the disparities must be significant enough to create a "greater likelihood" that any single exception decision was a component of an overall pattern of discrimination; 431 U.S. at 339-340, n.20, and 359 n. 45.

Defendant claims that plaintiffs' evidence is insufficient to establish a prima facie case of such pattern and practice discrimination, or at least that the evidence is so individualized that such claims cannot be class claims. This court therefore turns to an analysis of the evidence which plaintiffs have offered.[8]

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[8] A considerable quantity of this evidence, and the parties' discussion of it, was submitted by plaintiffs during the oral arguments on these motions and not in plaintiffs' pre-argument briefs.

1. Statistical evidence.

Plaintiffs submitted statistical evidence prepared by Dr. Richard Drogin, and defendant submitted the statistical report of Dr. Sandy Zabell. Ordinarily, differences between the conclusions of opposing experts would be a subject for trial. However, in this case, plaintiffs' statistical evidence does not satisfy plaintiffs' burden of establishing a prima facie case.

Dr. Drogin's key findings about weight exceptions were, first of all, not based upon a foundation of information which he prepared or even assembled. Rather, they were based upon information compiled and provided to Dr. Drogin by plaintiffs' counsel. The only foundational information which Dr. Drogin reviewed concerned the rate at which flight attendants were "put on weight report." The consequence of being "put on weight report" was not explained to this court. But the court concludes from the little information that is available that the reports were interim listings that in themselves resulted in no discipline to a flight attendant. Even if this conclusion were incorrect, those reports are insufficient to form the foundation for the findings that are relevant to plaintiffs' claims.

Dr. Drogin's statistics regarding weight exceptions only compared the number of male flight attendants receiving exceptions with all male flight attendants, and the number of female flight attendants receiving weight exceptions with all female flight attendants. But those comparisons do not make the key analysis that is important here: that is, whether there was a difference between males and females in the number of exceptions that were granted compared with the number requested.

Dr. Drogin's statistical analysis also shows that male flight attendants received a larger number of permanent

weight exceptions, while female flight attendants received a larger number of temporary weight exceptions. Again however, those numbers do not show the number of such exceptions granted compared with the number requested.

A statistically proper comparison should be based upon the number of requests, since the requests are the bases for defendant taking or denying some action. Plaintiffs do attempt to discuss "requests" in paragraph 13 of Dr. Drogin's report. However, that discusses only the number of men and women, and not the number of requests.

Plaintiffs contended at oral argument that because women got more temporary exceptions, they had to apply more frequently and therefore more requests were granted to women. That argument makes an improper leap from the fact that women got more temporary exceptions, to the conclusion that women had to apply or could only apply for temporary exemptions which is not supported by any evidence.

On the other hand, Dr. Zabell's report did focus on the number of weight exceptions granted compared with the exceptions requested. And it was based on data derived from 1,270 flight attendant medical files, with a summary of that data filed with the court. Dr. Zabell concluded that the rate at which female flight attendants were granted weight exceptions exceeded the rate at which male flight attendants were granted weight exceptions -- 89.91% for females and 85.71% for males. As to the permanent weight exceptions requested and granted, Dr. Zabell concluded 88.22% were granted to females and 11.78% were granted to males.[9] On the issue of age discrimination, Dr. Zabell's report focused on those over and under the age of forty. She found that 91.23% of the requests for weight exceptions by attendants

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[9] However, this did not compare grants with requests.

under 40 were granted, and 89.14% of the requests by flight attendants over forty were granted. She also found that as to the permanent weight exceptions which were granted, 78.24% were to flight attendants over forty and 21.76% were to flight attendants under forty.

These statistics are devastating to plaintiffs' claims. They show a higher, or at least statistically comparable, percentage of female weight exceptions granted, compared with the percentage of male exceptions. And on the issue of age discrimination, they show an essentially similar rate of granting weight exceptions for those attendants over forty and under forty. As to permanent versus temporary exceptions, overwhelming percentages were granted to women and to persons over forty (although this data did not compare grants with requests). There is, at the very least, an absence of statistical evidence showing any discriminatory pattern and practice. Taken as a whole, the statistics show at least neutrally-enforced policies. As to age, the enforcement has either resulted in a higher number of flight attendants over forty in defendant's flight attendant workforce, or at least has not discriminated against persons over forty.

Plaintiffs of course make certain attacks on Dr. Zabell's report. However, those attacks do not undercut the validity of her statistical conclusions. The key question is whether there is a statistically significant disparity between the granting of weight exceptions to men versus women, and to persons over forty versus persons under forty. Dr. Zabell's statistics make the valid comparisons, and the resulting conclusion is an absence of discrimination, by a standard of no genuine issues under FRCP 56.

2. Flight attendants' medical files.

Plaintiffs make arguments based upon information derived from the medical files, which were produced by

defendant to plaintiffs, of each flight attendant who applied for a weight exception. Plaintiffs stated their intention to use a summary of the files at trial, under Rule 1006 of the Federal Rules of Evidence.[10] Defendant argues that the files are not a proper subject for summary evidence under Rule 1006, but that there must be scrutiny of each individual file. Defendant also argues that individualized use of the files would violate this court's order of May 31, 1996. Defendant is correct, at least in part.

Some information from the files could perhaps be used in a statistically appropriate manner, ignoring for the moment the question of whether the information in each file has to be admissible evidence. But in any event, plaintiffs' statistician did not use those files in these pending motions. Instead, all we have are arguments regarding them by plaintiffs' counsel. And plaintiffs' arguments undercut their assertion that these claims can be handled on a class-wide basis. The information plaintiffs want to use would have to be extracted from each file in order to identify the relevant variables for each attendant. Based upon plaintiffs' arguments, there are numerous variables which would have to come from each medical file: Did the applicant ask for a temporary or a permanent exception? Was the grant of an exception temporary or permanent? How much overweight was each flight attendant? Were body fat percentages used in the calculations? If medication was a reason for the overweight problem, was that temporary medication or permanent medication such as hormones following menopause? What discipline was imposed, if any, for failure to comply with the weight requirements? What standards and criteria were used by each flight surgeon in each case? What use was made of body build? Was the effect of eating disorders considered?

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[10] Plaintiffs also make reference to twenty-two of the medical files in opposing these motions.

How much of an exception was granted? Were there other reasons for weight problems, or a history of weight problems? Were there other factors in which weight was otherwise beyond the applicant's control?

A mere listing of these considerations raised by plaintiffs compels the conclusion that if the medical file of each flight attendant has to be analyzed, then the claims are individual and not class claims. And in these summary judgment motions, plaintiffs' use of the medical files, which plaintiffs say is for statistical summary purposes, has not in fact been used for that purpose. The individual files do not themselves create any inference of class wide gender or age discrimination. If instead the individual files are to be used by plaintiffs for the cases of individual flight attendants, such use violates this court's order of May 31, 1996. That order directed that at trial there could be "no evidence of events which occurred to specific unnamed class members."

3. The Denenberg arbitration decision.

Plaintiffs cite to a 1988 decision by referee Denenberg in an arbitration between the Association of Flight Attendants and defendant. The issue in that arbitration was whether defendant had improperly administered the medical exceptions to the weight program. Ms. Denenberg concluded that defendant had improperly administered the medical exceptions.

To understand the significance of that decision to the present case, some history has to be recited. Ms. Denenberg's decision was in turn based upon a December 1971 arbitration decision which had created a procedure for processing applications for exceptions to the weight standards. Flight attendants could at that time apply for exceptions on the basis of medical problems beyond his or her control. (For example, body build, medication, or

medical recuperation). And there could be exceptions to the weight standards for medical problems which rendered it impossible for a flight attendant to maintain his or her weight below the established maximums. The reason for those provisions was apparently that defendant's weight program had not previously had exceptions for medical reasons. The reasonableness of defendant's weight program was upheld in 1971, with the additions of such exceptions. That is the weight plan which was ruled upon by Judge Pratt in 1979, and was previously discussed in this court's order of August 1995. Judge Pratt's decision resulted in modifications, and as so modified that weight program has been in existence since 1980.

In 1984, Dr. Gary Kohn became the medical director of defendant's flight employees. In 1986 Dr. Kohn issued a number of memoranda attempting to clarify the procedures and standards for weight exceptions. The flight attendants' union took exception to these memos, and that lead to arbitrator Denenberg's decision in 1988.

Arbitrator Denenberg found that although Dr. Kohn's desire for uniformity and scientific precision was understandable, the protocols defined in his memoranda nevertheless represented more stringent standards than those defined in the weight program itself. According to Ms. Denenberg, the appropriate standard was the granting of an exception upon a showing of "good cause." "Good cause" included "a medical problem which is beyond the employee's control." The arbitrator explained that an exception would be in order whenever a medical condition "significantly affected" an employee's weight.

What is the significance of that to the present motions? Plaintiffs argue that despite the Denenberg decision, defendant's numerous flight surgeons (who are the persons responsible for granting or denying the weight exception

requests) were instructed and did grant weight exceptions only if weight loss was "impossible." Plaintiffs cite to a memorandum from Dr. Kohn which does use "impossible" and "beyond control" language. His reference to an "impossibility" standard was not consistent with the arbitrator's decision. That memo could raise an inference of discrimination. The "impossibility" language, although incorrect, could be read standing above to be gender neutral. But Dr. Kohn then used an example of post-menopausal women who control their weight with hormone therapy.[11] Is that enough evidence of gender discrimination?

The flight surgeons responsible for granting or denying exceptions have submitted declarations in which each states that, in evaluating the exception requests, each applied the standards established by the Denenberg decision. Therefore, defendant argues that even if the memorandum from Dr. Kohn is incorrect, the flight surgeons did not mechanically apply an incorrect "impossibility" standard, but rather followed the correct Denenberg standards.

Plaintiffs attempt to counter this evidence by reference to some of the medical files. However, those examples merely show individualized decisions which, right or wrong, were based upon the circumstances of each applicant. They do not show a uniform use of an "impossibility" standard.[12] Because of the individualized considerations in each case, it is impossible to draw any class wide conclusions. It is clear

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[11] The record of these motions establishes that most women who applied for exceptions based on hormone therapy received exceptions.

[12] Certain of plaintiffs' arguments about the standards used by the flight surgeons are founded only on their general citations to the "Lopez Declaration" for factual support. However, their citation is only to the declaration, and not to any pages or sections. The declaration is approximately four inches thick and includes records of hundreds of weight exceptions given over a period of years.

however that "impossibility" has not been the pattern and practice standard applied by the flight surgeons. Plaintiffs have not demonstrated, even from the medical files, evidence of gender or age discrimination sufficient to establish intentional disparate treatment.

Are there nevertheless examples of gender or age discrimination in the granting or denial of exceptions which could apply on a class wide basis? The record cited to the court mentions few, if any, comparisons of how men and women with similar types of requests were granted or denied. Dr. Kohn states in his declaration that the flight surgeons who were asked for weight exceptions were required to consider the requests on a case-by-case basis, applying their best medical and clinical judgment to each individual case. They were also expected to use their best individual judgment in determining which, if any, tests and examinations to conduct and how to use and evaluate information from a flight attendant's treating physician.

Class wide, intentional disparate treatment simply does not appear from plaintiffs' record.

4. Other documents of defendant.

Plaintiffs cite the court to other memoranda prepared by personnel of defendant allegedly showing a pattern and practice of discrimination. The court has reviewed each of the memos:

A. A 1986 memorandum from Dr. Kohn. However, this predated the 1988 Denenberg decision and is not relevant to the standards applied by defendant after that decision.

B. A February 8, 1988 letter from the senior labor relations representative of defendant to a representative of the union. This was an attempt to

agree upon a standard form of letter to be sent to a neutral doctor serving in a weight exception dispute. Arbitrator Denenberg later adopted the union's requested version of the letter rather than defendant's. But all of that was a good faith attempt to draft a standard letter under the supervision of the arbitrator.

C. An undated memorandum from Judith Hart, in United's Industrial Relations Department, to defendant's flight surgeons. This memorandum discusses possible application of the medical exceptions. There is no indication whether it was before or after the Denenberg decision, but it is apparently an attempt to comply with the "beyond the control" and "significantly effect" standards. It appears to be gender neutral, and its one reference to age does not show discrimination.

D. A July 3, 1989 memorandum to flight surgeons from Dr. Kohn. The major thrust of this memorandum is an attempt for consistency in how the program might be administered.

E. A 1990 memorandum from one flight surgeon to others. The pages to which plaintiffs cite pertain to body fat percentages. This was expressly a draft for consideration among the flight surgeons, and was not adopted.

Plaintiffs have argued extensively about body fat percentages. In a memorandum to the flight surgeons Dr. Kohn discussed body fat percentages of 19% for men and 25% for women as being comparable. Plaintiffs argue that the 25% for women is more stringent than the 19% for men, that it changes with age, and that their experts will offer different standards based upon present information from

national studies. That appears to be another facial challenge to the weight program. But even if is "as applied," that argument does not indicate intentional discrimination. Dr. Kohn explained the method for selection of those percentages in paragraphs 15 and 16 of his declaration. They were based upon the medical literature available at the time. And there is no evidence that those standards, if they were standards, were adopted or applied for any discriminatory purpose. Body fat tests were one part of all of the criteria which the flight surgeons could apply, in their medical judgment, on an individualized basis. The record does not disclose any practice of requiring hydrostatic testing, or any per se application of the percentages. The record also indicates that even under plaintiffs' theory, there was no class-wide effect, because only two women who had hydrostatic fat tests were denied medical exceptions, and both were substantially over the 25% body fat level. Even the suggested testimony by plaintiffs' experts regarding twenty-five per cent being more stringent for women would not, on the record before the court, establish any intentional discrimination either by gender or by age.

F. A group of memoranda, primarily in the early 1980's before the Denenberg decision, regarding "body building" or "body build;" and the deposition testimony of Ms. Hart on this issue. However, Ms. Hart's deposition did not disclose any company policy on those issues. And Dr. Kohn's declaration disclaims any such policy. Under the Denenberg decision, defendant was required to consider "body build," and both men and women were granted such exceptions.

G. A January 25, 1993 memorandum from Dr. Kohn to the flight surgeons. This represented another effort at consistency in the administration of the weight program. The flight surgeons' declarations establish that their methods for decision making were not changed by this memo. They continued to evaluate weight exceptions requests based on individual medical judgment.

H. A November 15, 1993 regulation of United, P H(6). The regulation is ambiguous at best. It discusses age as a factor but does not lead the reader to any conclusion as to how that factor is applied. And the record does not show any intent by defendant to reduce the number of its older workers.

IV.

In reviewing the record of the evidence in these motions, the court finds and concludes that plaintiffs have not presented sufficient statistical or anecdotal evidence to satisfy their initial burden under Teamsters.

As ruled previously, defendant's weight program is facially valid and the only remaining gender challenge is "as applied." Evidence of some individuality in the granting of exceptions is not enough to show class-wide discriminatory treatment. It was necessary for defendant to apply the weight program to a very large employee population, spread over numerous venues, and applied by numerous flight surgeons. Uniformity in such circumstances, particularly dealing with such a personal issue as body weight, is impossible. It is inevitable that erroneous, inconsistent, and perhaps even discriminatory decisions were made in certain individual cases.[13] Such a large universe of human decision-making is

[13] Individual flight attendants who were denied exceptions had a right to use the grievance procedures under the collective bargaining agreement.

incapable of perfection or total consistency. But what is apparent from the record is that there was no uniformity, or pattern and practice, of applying the weight program or its exceptions in a deliberate, discriminatory fashion against females or persons over a certain age.

Summary judgment is therefore granted in favor of defendant and against plaintiffs on plaintiffs' class claims of gender and age disparate treatment. The court has previously ruled on plaintiffs' disparate impact gender discrimination claims (Order of August 16, 1995), and discusses below the disparate impact age discrimination claims. Because of this court's rulings on all of these subjects, defendant's motion to decertify the class is also granted.

A question remains as to whether these decisions preclude the named plaintiffs from pursuing individual claims for gender or age discrimination, which would then be analyzed under the standard of McDonnell Douglas v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). While some of the evidence presented in these motions has mentioned a few of the named plaintiffs, the focus has been on the class and pattern and practice criteria of Teamsters. This court has not done an analysis of the claims of the individually named plaintiffs. If necessary, that remains for another day.

V.

Defendant has made two further motions with respect to the age discrimination claims. Defendant argues that there cannot, as a matter of law, be an age disparate impact case (which the court identified as a triable issue in its order of August 16, 1995) because of recent developments in case law. And defendant moves for summary judgment on the age discriminations claims of certain opt-in plaintiffs.

A.

In its August 16, 1995 order, this court assumed that a disparate impact case for age discrimination could be asserted under the ADEA, based on the United States Supreme Court decision in Hazen Paper Company v. Biggins, 507 U.S. 604, 123 L. Ed. 2d 338, 113 S. Ct. 1701 (1993), which left the question open. Since then, several circuit courts have addressed that question, with mixed results.

The Ninth Circuit, in Mangold v. California Public Utilities Com., 67 F.3d 1470, 1474 (9th Cir. 1995), acknowledged that a disparate impact theory may no longer be appropriate under the ADEA, but did not decide the question. In the absence of controlling Ninth Circuit authority, this court takes its guide from the Tenth Circuit's decision in Ellis v. United Airlines, 73 F.3d 999 (10th Cir. 1996). This court does so because that case involved the same weight program of defendant that is at issue here. Ellis held that as a matter of law United's weight program did not violate the ADEA under a disparate treatment theory. It also concluded, following a discussion of the ADEA and Hazen Paper, that disparate impact claims are not cognizable under ADEA. This court therefore grants summary judgment in favor of defendant and against plaintiffs on this issue.

B.

Because of the court's rulings above, it is not necessary to consider defendant's motion directed to the age discrimination claims of the opt-in plaintiffs who allegedly suffered no wage loss during the limitations period. Because there is no disparate impact case under the ADEA, and because plaintiffs have not demonstrated a prima facie case of disparate treatment, no class-wide age discrimination claims remain.

VI.

The above decisions resolve this case as to the overwhelming majority of the claims. However, some issues remain: (1) The question of whether the named plaintiffs can assert gender discrimination and age discrimination claims, with their claims being analyzed under McDonnell Douglas. (2) Individual race discrimination claims, under disparate impact and disparate treatment analyses. And (3) individual handicap-disability discrimination claims under the ADA and the California FEHA.

A status conference will be held on March 21, 1997 at 11:00 a.m. to consider further proceedings on these issues.

IT IS SO ORDERED.

Dated: February 26, 1997.

CHARLES A. LEGGE
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-92-0692-CAL

LESLIE FRANK, *et al.*,

Plaintiffs,

v.

UNITED AIRLINES, INC.,

Defendant.

ORDER REGARDING MOTIONS, DEFINITION OF ISSUES, AND SCHEDULING

I.

Plaintiffs challenge defendant United Airlines' weight program for its flight attendants. Plaintiffs allege four types of discrimination under the applicable statutes: gender, age, handicap-disability, and race. By stipulation, the gender discrimination and age discrimination claims have been certified as a class action. The other two types of discrimination claims are individual claims by named plaintiffs. And the class claim will require some individualized proof, particularly on issues of damages.

II.

On January 19, 1995 the court denied the parties' cross-motions for partial summary judgment, on the ground that they presented genuine issues of material fact; except that the court denied defendant's res judicata motion on the merits.

Defendant then made a motion for reconsideration and motions to strike certain of plaintiffs' damages claims and plaintiffs' demand for a jury trial. Those motions were

briefed, argued, and submitted to the court for decision. At the same time, the court conducted two extensive status conferences, during which the parties' positions on the issues, the applicable law, and further proceedings were discussed. The parties also filed outlines of their views of the issues to be resolved.

The court has reviewed the above record, the arguments of the parties, and the applicable authorities. The court concludes that its January 19, 1995 order was in part in error; the error resulted from the court's misunderstanding of the scope of the prior litigation and the subsequent changes in defendant's weight program. Defendant's motion for reconsideration is therefore granted and the January 19, 1995 order is vacated.

This order will rule upon certain of the legal issues raised by the parties, define to the extent now possible the issues remaining in the case, and schedule further proceedings for motions, pretrial and trial.

III.

The central issue in the case is whether defendant's weight program for its flight attendants, and primarily the weight charts, are unlawful gender discrimination under Title VII. Plaintiffs contend that the weight charts are gender discrimination on their face and as applied.

Defendant's present weight program and weight tables have been in effect since February 1980. There have been no changes in the tables or the program since that date, except for a few which were either favorable to plaintiffs or make no difference to the issue in this case: the date of weigh-in; an exception for the weight of the uniform itself; and weight exception procedures. The last change was apparently presented to an arbitrator in 1987 who resolved the matter,

either in favor of plaintiffs or on issues that are not relevant to this case.

Defendant's present weight charts and weight program apply to both men and women. However, the permissible weights for men are somewhat higher than those for women of the same height.

A.

There have been numerous cases alleging gender discrimination in weight programs in the airline industry. After reviewing the relevant cases, the court concludes that defendant's weight chart is not facially discriminatory. That is, it is legally permissible to have different weights for men and women. But the weight charts must be comparable and reasonable in the differences between men and women, and they must be comparably applied. In Gerdon v. Continental Airlines, Inc., 692 F.2d 602 (9th Cir. 1982), the weight program applied only to women and was held to be discriminatory on its face for that reason. ALPA v. Western Airlines, Inc., 23 F.E.P. cases 1042 (N.D. Cal. 1979), held that different weight standards for men and women were not a violation of Title VII. ALPA v. United Airlines, 26 F.E.P. Cases 607 (ED NY 1979), Judge Pratt's decision discussed extensively below, also held that defendant's separate weights did not violate Title VII. Jarrell v. Eastern Airlines, Inc., 430 F.Supp. 884 (ED VA 1977), held that weight charts could be different if they were reasonable, and that equality was not required under Title VII. In re National Airlines, 434 F.Supp. 269 (S.D. Fla. 1977), held that equality was not required in weight schedules applied to men and women. IUFA v. Pan American, 50 F.E.P. Cases 1698 (N.D. Cal 1987), held after trial that the weight programs were not unlawful under Title VII, but would violate Title VII if they applied only to women, applied arbitrarily different terms to women, or were enforced unequally against women.

Based upon this body of authorities, plaintiffs must demonstrate that defendant's weight charts are not comparable between men and women. Or they must show that the weight program was applied to men and women in a discriminatory manner.

B.

Defendant argues that any further attack on its weight program is barred by res judicata. That is, defendant argues that plaintiffs' Title VII gender discrimination claims were previously litigated in Airline Pilot's Association v. United Airlines, Inc., 26 F.E.P. Cases 607 (ED NY 1979). In late 1979, Judge Pratt there held that United's separate weight standards for male and female flight attendants did not violate Title VII. But Judge Pratt also held that defendant had discriminated against women in its uneven enforcement of those standards. The present program, initiated in February 1980, was prepared as a result of Judge Pratt's decision. The 1980 program adopted a new enforcement mechanism, which attempted to eliminate any subjective discretion in the enforcement of the program. And the 1980 plan made two other changes, both of which were favorable to plaintiffs: a few pounds were added to the weight tables at each height level, and an aging factor was added. This revised plan was submitted to Judge Pratt, although he made no express ruling on it. As stated, this plan has been in effect since early 1980.

The doctrine of res judicata

> bars all grounds for recovery which could have been asserted, whether they were or not, in a prior suit between the same parties .... on the same cause of action.

C.D. Anderson & Co., Inc. v. Lemos, 832 F.2d 1097, 1100 (9th Cir. 1987). Four factors are considered in determining

whether successive lawsuits involve the same "cause of action":

> (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. . . . The last of these criteria is the most important.

Id.

This court concludes that Judge Pratt's decisions about the weight table and weight program, except for the manner in which the program is enforced, is res judicata to plaintiffs' gender discrimination claims in this case. Judge Pratt necessarily decided that the differences in the weight schedules between men and women did not violate Title VII. And the resulting changes to the tables were favorable to plaintiffs and are not such changes as to avoid the res judicata consequences of Judge Pratt's decision.

The 1979-1980 correspondence between defendant and the then counsel for plaintiffs also reflects that the 1980 plan was a settlement of the issues before Judge Pratt, which resulted in the conclusion of that litigation. As stated, the program was changed as a result of Judge Pratt's decision. The revised program was submitted to plaintiffs' attorneys. Plaintiffs then agreed not to appeal Judge Pratt's decision. The change in the litigated program, coupled with an agreement not to appeal the judge's then decision while it was still pending, was a negotiated settlement. Plaintiffs' representatives at that time were not just their union agents,

but also their class representatives, and it was an agreed upon disposition by the class.

Plaintiffs make several arguments as to why Judge Pratt's decision and the settlement should not be given res judicata effect:

Plaintiffs argue that there is now a material difference in the program, because the one before Judge Pratt was based upon defendant's general appearance requirement of a "neat and trim" appearance, while the present program uses the term "professional" appearance. However, it is obvious that both are concerned with appearance. And Judge Pratt expressly said that "weight is a factor in appearance," and that "United's weight regulations are an integral part of the appearance control standard."

Plaintiffs argue that the across-the-board weight increases for both genders are relevant discrimination, because the increased weights for men exceed the Metropolitan Life Insurance charts. However, Judge Pratt already determined that the Metropolitan Life Insurance charts were not relevant. He held that because the plaintiff class was not comparable to the general population covered by those charts, comparison of defendant's charts with Metropolitan Life Insurance charts was unproductive. That may have been right or wrong, but it was examined and decided.

Plaintiffs argue that res judicata should not apply because the persons who are members of plaintiffs' class have changed over the years. However, the class certified in Judge Pratt's decision included all future airline flight attendants. The present plaintiffs are members of that class, and the privity requirement of res judicata is satisfied. See NAACP v. Los Angeles Unified School District, 750 F.2d 731, 741 (9th Cir. 1984) ("A judgment on behalf of a class

binds all persons belonging to the class and all those who subsequently come into the class."). The fact that Judge Pratt's class included future flight attendants also undercuts plaintiffs' argument that res judicata should not apply because defendant's program constitutes a continuing violation. The results of Judge Pratt's decision, if binding at all, must be viewed as binding future members of the class defined in his class order.

Plaintiffs argue that res judicata should not apply because there have been subsequent changes in the facts and the law. The alleged changes to United's weight program have been discussed above, and they were either favorable to plaintiffs or not relevant to the gender discrimination issue. Plaintiffs contend that there have been changes in industry practices with respect to weight programs and changes in medical evidence. However, those changes do not alter the fact that this program was resolved by Judge Pratt based on the evidence presented to him. Plaintiffs are also mistaken in their legal contention that intervening changes in fact, evidence or law must preclude the res judicata effect of a prior judgment. They cite Commissioner v. Sunnen, 333 U.S. 591, 600 (1948), for the proposition that "a judicial declaration intervening between the two proceedings may so change the legal atmosphere as to render the rule of collateral estoppel inapplicable." As is evident from the quoted language, however, Sunnen concerned the doctrine of collateral estoppel, not res judicata. While intervening changes of fact or law could prevent application of collateral estoppel, they do not preclude res judicata. See Federated Department Stores, Inc. v. Moite, 452 U.S. 394, 398 (1981) ("[T]he res judicata consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong or rested on a legal principle

subsequently overruled in another case."); 1B Moore's Federal Practice, ¶ 0.415 (2d ed. 1993).

This court stated in its January 19, 1995 order that Judge Pratt expressly disclaimed the future application of his decision. However, this court now agrees with defendant that Judge Pratt did not have the power to disclaim the res judicata effect of his decision. See Wright, Fed. Pr & Proc, § 1789 at p. 245 ("It is well settled that the court adjudicating a dispute cannot predetermine the res judicata effect of its own judgment; that can be tested only in a subsequent court.").

C.

This court therefore concludes that plaintiffs' gender discrimination claims are barred by res judicata, except their claims that defendant's program has been applied in a discriminatory manner. The court believes that this claim must be tried and analyzed under the principles of disparate treatment.

IV.

United argues that plaintiffs' age discrimination claim is also barred by the res judicata effect of Judge Pratt's decision.

As noted above, the doctrine of res judicata

> bars all grounds for recovery which could have been asserted, whether they were or not, in a prior suit between the same parties . . . on the same cause of action.

C.D. Anderson, 832 F.2d at 1100. United argues that plaintiffs' age discrimination claim is precluded, even though it was not brought in Judge Pratt's case, because it could have been brought then. Judge Pratt addressed and rejected

an age-based argument in his decision. He did not address an age discrimination claim, but merely the argument that "United's height-weight standards discriminate because they fail to account for the impact of aging on a woman's ability to maintain a given weight level." The present claim addresses the relative weight increases of men and women as they age. Judge Pratt did not consider the availability of an age discrimination claim independent of sex.

An age discrimination claim was not a part of the same "cause of action" that was before in Judge Pratt. As quoted above, one of the factors considered in making a res judicata determination is "whether the two suits involve infringement of the same right." C.D. Anderson, 832 F.2d at 1100. An age discrimination claim involves infringement of a different right than a sex discrimination claim.

This court concludes that plaintiffs' age discrimination claim is not barred by res judicata.

B.

United also moves for summary judgment on the merits of plaintiffs' age discrimination claim. Defendant first argues that because it allows older flight attendants to weigh more than younger flight attendants of the same height and sex, it is treating older workers more favorably, and that completely precludes any claim of unlawful age discrimination. But United could discriminate on the basis of age even while allowing for some weight increases for older employees, if the increases are insufficient to account for relevant differences between younger and older workers.

United also argues that the U.S. Supreme Court's decision in Hazen Paper Co. v. Biggins, 1113 S. Ct 1701 (1993), somehow precludes plaintiffs' age discrimination claim. In Biggins, a disparate treatment case, the Court held that "there is no disparate treatment under the ADEA when

the factor motivating the employer is some feature other than the employee's age," even when that feature happens to be "empirically correlated with age" and the employer's policy results in a disproportionate impact on older workers. Id. At 1705. United argues that in this case there is no disparate treatment even if the weight program happens to have a disproportionate impact on older flight attendants, because the purpose of program is to maintain an appearance standard.

However, the premise of United's argument is that the purpose of the weight program is indeed to maintain an appearance standard. Plaintiffs dispute this premise, and maintain that the weight program is designed to eliminate older workers. Biggins held only that if the employer is in fact motivated by some factor other than the employee's age, the mere fact the employment practice has a disproportionate impact on older workers does not establish discriminatory intent. Also, Biggins expressly declined to decide whether a disparate impact theory is available under the ADEA. Id. At 1706 ("[W]e have never decided whether a disparate impact theory of liability is available under the ADRA, and we need not do so here. Respondent claims only that he received disparate treatment."). Thus even if the purpose of the weight program was, as United contends, to maintain an appearance standard, Biggins would not preclude plaintiffs from at least proceeding on a disparate impact theory.

The age discrimination claim presents factual issues, under both disparate treatment and disparate impact analyses, and summary judgment is therefore denied.

V.

Defendant has argued that plaintiffs' race discrimination claims are barred by res judicata. However, this argument was not directly addressed in defendant's motion for

summary judgment or motion for reconsideration. It does not appear that Judge Pratt addressed this issue in his case. To the extent that defendant has made this argument, the motion is denied.

United does not contend that plaintiffs' claims of disability-handicap discrimination are barred by res judicata.

VI.

The court therefore concludes that plaintiffs' remaining claims are: (1) Gender discrimination insofar as plaintiffs allege that defendant's weight program is applied in a discriminatory manner. The court believes that this must be analyzed under a disparate treatment theory. (2) Age and race discrimination, under both disparate impact and disparate treatment. analyses. (3) Handicap-disability discrimination, under the elements of the ADEA statute.

VII.

Defendant's motions and plaintiffs' replies have raised certain issues about the application of the Civil Rights Act Amendments of 1991 to this case.

A.

Before the 1991 amendments, Title VII provided for equitable remedies and the primary monetary relief available was backpay. Landgraf v. USI Film Products, 114 S. Ct. 1483, 1490 (1994). Other remedies included attorneys' fees and costs, reinstatement, and prejudgment interest. Hashimoto v. Dalton, 870 F.Supp. 1544, 1545 (D. Hawaii 1994). The 1991 amendment, however, added a right to jury trial and added compensatory and punitive damages in cases of "unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact)." 42 U.S.C. § 1981a(a)(1). The amendments also modified the legal standard in "mixed motive" cases, by permitting "a

finding that an employer has committed an unlawful employment practice whenever an improper consideration is a 'motivating factor' in an employment decision, regardless of whether the employer would have take the same action in the absence of the improper consideration." Chenault v. U.S. Postal Service, 37 F.3d 535, 538 (9th Cir. 1994).

The U.S. Supreme Court held in Landgraf that the amendment's additional damages remedies are not retroactive. The Ninth Circuit has also held that a certain other provisions of the amendments are not retroactive. Chenault, 37 F.3d at 538-39.

B.

United moves to strike plaintiffs' gender discrimination claims for compensatory and punitive damages under the 1991 amendments, on the ground that plaintiffs cannot demonstrate the "unlawful intentional discrimination" required under § 1981a(a)(1). However, such alleged discrimination in the application of the weight program is an issue of fact. Accordingly, United's motion to strike is denied.

C.

Defendant also argues that the damages allowed by the 1991 amendments can have no application to plaintiffs' gender discrimination claims, because the weight program was implemented in 1980. However, plaintiffs may rely on the amendments to the extent they seek such damages for United's discriminatory application of the program after the enactment of the amendments. That is, class members who can prove injury from the discriminatory application of the weight program after November 21, 1991, are entitled to seek the damages allowed by the amendments.

D.

Section 1981a(a)(1) of the 1991 amendments, requiring a showing of disparate treatment in order to recover certain damages, also applies to plaintiffs' age and race claims. The handicap-disability claims are governed by § 1981a(a)(2)-(3). Under those sections, damages are available upon proof of either disparate treatment or a failure to accommodate without a good faith effort.

E.

The parties raise the question of whether this court or the jury will make the decisions on the disparate impact claims. The 1991 amendments provide that if a party is seeking compensatory or punitive damages, then the party may demand a trial by jury. Section 1981a(c). However, as noted, the amendments provide for compensatory and punitive damages only upon a showing of disparate treatment, and not disparate impact. In this case where issues of both disparate treatment, and hence the possible right to compensatory and punitive damages, and disparate impact may be tried, is the entire case tried to a jury? The court has not discovered any cases which expressly address this question. Defendant's motion to strike plaintiffs' jury demand is therefore denied, without prejudice to later consideration.

F.

Any further decisions regarding application of the 1991 amendments to the trial of this case will be addressed on further motions or at the pretrial conference.

The parties' outlines of the issues raise additional procedural and substantive questions which may have to be resolved prior to trial. However, they have not as yet been

briefed, and such motions will have to be addressed by the parties in the context of the decisions made in this order.

VIII.

The following schedule is set:

All further motions by the parties, both substantive and procedural, are to be filed by September 29, 1995. The motions will be heard on October 26, 1995 at 1:30 p.m.

The pretrial conference will be on November 30, 1995 at 3:00 p.m.

The trial will be on December 11, 1995.

In view of the substantial delays which have occurred in resolving the issues in this case, for which this court bears some of the responsibility, the court will consider changes in these dates to suit the convenience of the parties and the attorneys. However, the interests of justice do compel the final resolution of the issues in this case as soon as possible.

IT IS SO ORDERED,

Dated: August ___, 1995.

_____

CHARLES A. LEGGE
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. 73 C 1082.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *et al.*

Plaintiffs

v.

UNITED AIRLINES, INC.,

Defendant.

Oct. 30, 1979.

DECISION AND ORDER

INTRODUCTION

Plaintiffs in this action are the Airline Pilots Association (ALPA) and several female flight attendants of defendant United Airlines, Inc. (United). Plaintiffs brought this action on behalf of themselves and, pursuant to FRCP 23(b)(2), on behalf of a class defined as all female flight attendants who are or will be employed by United and all former female flight attendants who were employed by United on or after October 14, 1971 and were removed from schedule, suspended, or terminated for failure to meet United's weight regulations.

Plaintiffs alleged that United engaged in sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. s 2000e Et seq. (Title VII), in the maintenance and enforcement of its weight regulations for flight attendants. The action was bifurcated for trial, and evidence on the question of whether defendants had violated Title VII was presented to the court without a jury on June

5-9, 1978. By memorandum and order dated June 12, 1979, the court filed findings of fact and conclusions of law.

The court concluded, inter alia, that: (1) plaintiffs had failed to prove by a preponderance of the evidence that United's separate height/weight standards for male and female flight attendants violated Title VII by discriminating on the basis of sex; (2) United's policies regarding exceptions to the weight regulations had discriminatorily favored male Hawaiian stewards; (3) because United had demonstrated special circumstances justifying discriminatory favoring of male Hawaiian stewards with respect to the granting of exceptions, there was no Title VII violation with respect thereto; and (4) plaintiffs had proved by a preponderance of the evidence that United had violated Title VII by enforcing its flight attendant weight standards program in a manner that discriminated against the plaintiff class on the basis of sex.

The parties thereafter submitted proposed orders setting forth the remedies which they believed should be provided for the violations, and filed briefs and presented argument with respect to the remedy questions. Based upon this information the court now issues the following order and decision relating to these findings and the relief to be awarded to members of the class pursuant to 42 U.S.C. s 2000e-5(g).

ORDER

I. INJUNCTIVE RELIEF

1. United, its officers, agents, employees and successors are hereby permanently enjoined from discriminating on the basis of sex in the enforcement of United's flight attendant weight regulations, including any discipline or penalties that may be imposed for violations thereof.

II. REINSTATEMENT AND BACK PAY TO FEMALE FLIGHT ATTENDANTS DISCIPLINED BY UNITED

A. Terminated Flight Attendants

2. United shall within 30 days of this order offer reinstatement at full salary to each female flight attendant who has been terminated between March 24, 1972 and the date of this order for failure to meet United's flight attendant weight standards. The offer shall specify an effective date between 60 days and 90 days from the date of the offer.

3. For seniority system purposes, any female flight attendant reinstated pursuant to P 2 shall be credited with having been in the continuous employ of United from the date of her termination until the date of her reinstatement.

4. Any female flight attendant reinstated pursuant to P 2 must comply with United's weight regulations in effect on the date of reinstatement and thereafter.

5. United may, as a condition for reinstatement, require any female flight attendant reinstated pursuant to P 2 to undergo a program of training in order to update her knowledge and skills to correspond with United's current practices and equipment.

6. United shall pay to each female whose employment was terminated between March 24, 1972 and the date of this order for failure to meet United's flight attendant weight standards, back pay for the period between the date of her termination and the effective date of the reinstatement to be offered in accordance with P 2 of this order. The amount of back pay shall be the difference between (a) the wages and benefits she would have earned from United during said period had she not been wrongfully terminated and (b) the

sum of (i) the amount actually earned, or earnable with reasonable diligence, during said period from other work which would not have been performed had she not been terminated, and (ii) the amount received from unemployment insurance and similar benefits.

B. Flight Attendants Suspended or Removed from Schedule

7. United shall immediately restore to flying status, at full salary, each female who is off active flight status on the date of this order because of a suspension or removal from schedule for failure to meet United's flight attendant weight standards.

8. For seniority system purposes, any female flight attendant who is restored to flying status pursuant to P 7, or who previously lost seniority as the result of a suspension or removal from schedule because of a weight violation between March 24, 1972 and the date of this order, shall be credited with having been in the continuous employ of United from the date of her suspension or removal from schedule until the date of her restoration to flying status.

9. United shall pay to each female flight attendant who, between March 24, 1972 and the date of this order, lost money because of a suspension or removal from schedule for failure to meet the weight standards, back pay for the period of each such suspension or removal. The amount of back pay shall be the difference between (a) the wages and benefits she would have earned during said period had she not been wrongfully suspended or removed from schedule and (b) the sum of (i) the amount actually earned or earnable with reasonable diligence during said period from other work which would not have been performed had she not been suspended or removed from schedule, (ii) the amount received from unemployment insurance and similar benefits,

and (iii) the amount received from any makeup of the *schedule time lost* as a result of the wrongful suspension or removal.

III. NULLIFICATION OF REFERENCES IN UNITED'S RECORDS TO DISCIPLINE AGAINST FEMALE FLIGHT ATTENDANTS

10. Any reference in United's records to any discipline taken against female flight attendants for weight violations during the period between March 24, 1972 and the date of this order is void. Within 30 days of this order, United shall add a notice to the personnel records, medical files and weight records of each female flight attendant disciplined for weight violation between March 24, 1972 and the date of this order. The notice shall indicate that all records of any kind of disciplinary action taken between March 24, 1972 and the date of this order for failure to meet weight standards (including oral warnings, letters of warning, letters of charges, removals from service, suspensions and terminations) are void. The notice shall also state that no such record may be used or considered as a predicate violation in any program of progressive discipline, nor in any other way to the employee's detriment.

IV. INTEREST

11. With respect to the back pay to be paid under the provisions of this order, United shall pay interest at the rate of six percent (6%) per annum.

V. ATTORNEYS' FEES AND LITIGATION EXPENSES

12. United shall pay reasonable attorneys' fees for plaintiffs' legal representation and reimburse plaintiffs for all reasonable expenses incurred in litigating this action. If the amounts of attorneys fees and expenses are not agreed to within 60 days after appeals are concluded, plaintiffs may

move within 30 days thereafter to have those amounts determined.

VI. RETAINED JURISDICTION

13. Until all payments required by this order have been made, the court will retain jurisdiction of this action for the purpose of issuing any additional orders needed to effectuate, clarify or enforce the purposes and intent of this order.

DECISION

Injunctive Relief

As noted previously, the court has concluded that plaintiffs failed to prove that United's separate height/weight standards for male and female flight attendants violated Title VII. Accordingly, United is free to continue using the flight attendant weight standards promulgated by United in May 1977. Nothing in the court's decision or order is intended to pass upon the validity of any other weight standards for male or female flight attendants that United might adopt in the future.

Paragraph 1 of the order enjoins United from discriminating on the basis of sex with respect only to the enforcement of whatever flight attendant weight regulations United may have in effect. This reflects the court's views that United's current weight standards for male and female flight attendants are valid, that United is not prohibited from adopting other standards, and that the validity of any other standard has not been determined. However, whatever standards are established, United must enforce in a non-discriminatory manner.

To insure compliance with the injunctive provisions of P 1 of the order, United shall submit quarterly to ALPA a report which shall contain: (a) the names of all flight attendants who received oral warnings, letters of warnings,

letters of charge, suspensions, removals from service, or termination for weight violations during the three months covered; (b) copies of the weight related records and correspondence for individuals so disciplined; and (c) data concerning the granting or denial of exceptions to the weight program during the three months covered. Each report shall be submitted to ALPA within 30 days after the end of the last month covered by the report.

Reinstatement and Back Pay to Female Flight Attendants Disciplined by United

A. Identifying Disciplined Flight Attendants.

The parties have already identified and agreed upon a list of all female flight attendants who were removed from schedule, suspended, or terminated either wholly or partially because of weight violations during the period from January 7, 1970 through May 15, 1978. The parties shall meet to identify and agree upon a list of all female flight attendants who were removed from schedule, suspended, or terminated either wholly or partially because of weight violations, during the period from May 15, 1978 through the date of the order.

B. The Period of Discriminatory Enforcement.

Plaintiffs argue that the period of discriminatory enforcement began in 1950 when United first hired males for the newly created position of Hawaiian steward. Because the first EEOC charge was filed on August 10, 1972, and because s 706(g) of Title VII provides that "(b)ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission", 42 U.S.C. s 2000e-5(g), plaintiffs contend that the back pay remedies provided for in the order should apply to any female flight attendant who was disciplined after August 10, 1970. Viewing the Hawaiian stewards as a special group,

United argues that because it did not employ any other male flight attendants until March 24, 1972, there could not have been, prior to that date, any disparate treatment of females and males in the enforcement of weight regulations.

After considering the arguments of counsel the court concludes that the beginning of discriminatory enforcement should be fixed as of March 24, 1972. Although United has maintained some form of height/weight requirements for flight attendants since 1930, United did not employ male flight attendants until March 24, 1972. It is true that prior to 1972 United did employ males as Hawaiian stewards who performed duties similar to those of the female flight attendants. However, since there were no height/weight requirements for Hawaiian stewards comparable to those for flight attendants until late 1972 (memorandum and order of June 12, 1979, finding of fact 47) United could not have discriminatorily favored the male Hawaiian stewards in enforcing weight regulations before that time.

In reaching this decision the court recognizes that in 1979 this litigation seeks to remedy wrongs which occurred over a considerable period of time and involved many individuals. Since the circumstances of each individual case is impossible to determine, however, some general principle or standard must be applied which will produce substantial justice and remedy the past discrimination which has occurred. Since March 24, 1972, the date when United first employed male flight attendants other than the special group of Hawaiian stewards, is the most apparent date for beginning discriminatory enforcement of the weight standards, the court selects that date as the beginning of the period of discriminatory enforcement.

C. Establishing Entitlement to Remedies.

Those female flight attendants who were disciplined during the period of discriminatory enforcement wholly because of weight violations are entitled, without further inquiry or proof, to the remedies set forth in the order. A problem is presented, however, as to those female flight attendants who United claims were disciplined partially because of weight violations and partially for other reasons.

In Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), the Supreme Court, considering an analogous situation, established controlling principles for dealing with the causation issues here presented. There, a teacher sought reinstatement and damages from his former employer, claiming that his employment had been wrongfully terminated because he exercised his first amendment right of free speech, and that his exercise of the protected conduct had been a contributing factor in the decision to discharge him. Finding that "(t)he constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the (protected) conduct", 427 U.S. at 285-86, 97 S.Ct. at 575, the Court stated

> the burden was properly placed upon (the teacher) to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor" or to put it in other words, that it was a "motivating factor" in the (school) Board's decision not to rehire him. (The teacher) having carried that burden, however, the District Court should have gone on to determine whether the Board has shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.

429 U.S. at 287, 97 S.Ct. at 576.

While not directly applicable, these principles provide guidance to the resolution of the remedy issues presented by this case. The court has previously determined that United practiced gender based discrimination in enforcing its weight regulations. Therefore, any female flight attendant who was disciplined even partially because of a weight violation is now deemed to have established that her violation during the period of discriminatory enforcement was a substantial factor, a motivating factor in United's decision to impose disciplinary sanctions. Therefore, under Mt. Healthy, the burden now shifts to United to establish by a preponderance of the evidence that the same discipline would have been imposed even in the absence of any weight violation during the period of discriminatory enforcement.

D. Compliance with Weight Regulations upon Reinstatement.

Pursuant to P 4 of the order, reinstated flight attendants must comply with United's weight regulations in effect on the date of reinstatement. The court recognizes that while out of United's employ these flight attendants, who exhibited difficulty in meeting the weight standards when there were obvious employment incentives to do so, may need a reasonable grace period in order to comply now with the weight regulations. Accordingly, beginning with the effective date of her reinstatement, a flight attendant shall be exempt from the established weight standards for a period of time equal to one month for each year, or part of a year, since she was terminated.

During this grace period, however, a reinstated flight attendant, in order to continue to be exempt from the weight standards, shall be required to lose monthly a pro-rata portion of her excess weight (E. g., a person with a 4 month

grace period and 20 lbs. to lose in order to meet her current weight requirement modified by any exception, must lose 5 pounds by the end of the first month, 10 pounds by the end of the second month, etc.). Upon loss or expiration of the exemption a reinstated flight attendant shall immediately become subject to United's non-discriminatory weight enforcement regulations.

E. Additional Training.

Paragraph 5 of the order permits United to require reinstated flight attendants to undergo a program of training as a condition for reinstatement. The court recognizes that reinstated flight attendants may need refresher or additional training in order to be qualified to work on newly acquired aircraft or to perform job responsibilities which have been added or altered during their absence from employment. During any such training period a reinstated flight attendant shall receive the same salary she would have received if immediately restored to full flying status.

Mechanics for Payments Pursuant to the Order

Counsel for ALPA and United shall meet within 30 days to establish procedures for determining the exact monetary amounts due to each female flight attendant pursuant to the provisions of paragraphs 6 and 9 of the order. All costs incurred in making those determinations shall be borne by United. The procedures adopted shall assure that such payments as are agreed upon shall be made within 90 days after the date of the order. Any dispute as to entitlement or computation which cannot be resolved by agreement of counsel shall be reported promptly to the court and will be referred to a master for a hearing followed by a report and recommendation. Despite the court's imposition of the costs of such proceedings upon United, in the event of unreasonable or frivolous claims by ALPA the court may, on

recommendation of the master, impose upon ALPA part or all of the costs made necessary by such claims, to be deducted from the award of attorney's fees ultimately to be made.

Costs and Attorney's Fees

The statutory authorization for an award of costs and attorney's fees in a Title VII action is found in 42 U.S.C. s 2000e-5(k):

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party * * * a reasonable attorney's fee as part of the costs * * *.

The Supreme Court has construed the "discretionary" language of the statute to require that "a prevailing Plaintiff ordinarily is to be awarded attorney's fees in all but special circumstances." Christianburg Garment Co. v. EEOC, 434 U.S. 412, 417, 98 S.Ct. 694, 698, 54 L.Ed.2d 648 (1978) (emphasis in original). See also Albermarle Paper Co. v. Moody, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). The Second Circuit found this statute to be "aimed at enforcing congressional mandates against discrimination through private actions and (a statute which) should be read 'broadly to achieve its remedial purpose' ". Carey v. New York Gaslight Club, Inc., 598 F.2d 1253, 1256 (CA2 1979), Quoting Mid-Hudson Legal Services, Inc. v. G & U, Inc., 578 F.2d 34, 37 (CA2 1978).

In this case one question of attorney's fees focuses on the statutory term "prevailing party". While plaintiffs did prevail to the extent that they established that United had discriminated on the basis of sex in enforcing the flight attendant weight program, plaintiffs failed in their attempts to prove Title VII violations in the varying height/weight standards for male and female flight attendants and in the

exceptions granted to the Hawaiian stewards. United argues that it should be awarded attorney's fees as a prevailing party; that ALPA should be denied attorney's fees because ALPA did not prevail within the meaning of Title VII; or alternatively, that ALPA, as a partially prevailing party, should be awarded attorney's fees reduced proportionately for the lack of total success.

In Christianburg Garment Co. v. EEOC, supra, the Supreme Court concluded that while prevailing plaintiffs should be awarded attorney's fees in all but special circumstances, a prevailing defendant could be awarded attorney's fees only if plaintiff's action was "frivolous, unreasonable, or without foundation". 434 U.S. at 421, 98 S.Ct. 694. Even assuming, *arguendo*, that United was a prevailing defendant, nonetheless, ALPA's claims about the weight standards were neither frivolous, unreasonable nor without foundation. Accordingly, the court rejects United's request for attorney's fees.

United next suggests that plaintiffs are not prevailing parties because they succeeded on only part of their case. The court does not agree. It is clear that if plaintiffs had brought a successful action seeking relief only for United's discriminatory enforcement of the weight standards, plaintiffs would have been the prevailing parties for the purposes of Title VII and s 2000e-5(k). The court can find no reason why plaintiffs should be penalized for having sought additional relief with respect to the validity of the standards themselves.

It is widely recognized that the "purpose of this provision for counsel fees is to facilitate the bringing of individual complaints in order to 'effectuate the congressional policy against * * * discrimination.' " Carey v. New York Gaslight Club, Inc., 598 F.2d at 1256 Quoting Johnson v. Georgia Highway Express, 488 F.2d 714, 716 (CA5 1974), and that

the policies of the attorney's fees provisions are "best served by encouraging plaintiffs to seek the broadest relief they feel, in good faith, that they are entitled to." Palmer v. Rogers, 10 EPD P 10,499 at 6130 (D.D.C.1975). See also Newman v. Piggie Park Enterprises, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968).

While plaintiffs were unable to prove all the aspects of sex discrimination they complained of, the Title VII claims advanced against United were reasonable and brought in good faith. Moreover, the circumstances of this case prevented the claims of discriminatory conduct from being easily separated. In order to clearly present for evaluation the operative impact of United's height/weight program it was necessary and reasonable for plaintiffs to review the origin and history of the weight standards program, its relationship to the Hawaiian stewards, the hiring of other males as flight attendants, the disciplinary penalties imposed, and the overall reasonableness of the standards themselves.

Ultimately, of course, United was found to have discriminated on the basis of sex in violation of federal law, but only in its enforcement of the program. As a result, United must alter its weight standards enforcement policies to comply with Title VII and make restitution to wrongfully discharged and disciplined female employees. Plaintiffs therefore succeeded on a central, not collateral, aspect of their claims, and much of the proof presented on the other aspects was necessary for a full understanding of the successful contention.

While some courts have, in their discretion, denied attorney's fees to plaintiffs who only partially prevailed, See e. g., Roesel v. Joliet Wrought Washer Co., 596 F.2d 183, 187 (CA7 1979); Adams v. Reed, 567 F.2d 1283 (CA5 1978), many courts have concluded that plaintiffs may recover attorney's fees although they prevailed on less than

all the issues of the case. See e. g., Rosenfeld v. Southern Pacific Co., 519 F.2d 527, 529 (CA9 1975); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421, 429-30 (CA8 1970); Richardson v. Civil Service Commission, 449 F.Supp. 10, 11-12 (S.D.N.Y.1978); Boyd v. Ozark Air Lines, Inc., 419 F.Supp. 1061, 1065 (E.D.Mo.1976); Parker v. Matthews, 411 F.Supp. 1059, 1064 (D.D.C.1976).

Under the circumstances of this case, the court in its discretion concludes that the purposes and underlying policies of the statute are best served by awarding plaintiffs reasonable attorney's fees and expenses for the entire litigation, to be determined as provided in the order.

Stay Pending Appeal

If either party takes a timely appeal from this order and judgment the provisions hereof shall be deemed stayed, without further application to the court, pending final disposition of the appeal.

SO ORDERED.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 73 C 1082

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *et al.*,

Plaintiffs

v.

UNITED AIR LINES, INC.,

Defendant.

June 12, 1979

Plaintiffs claim that United Air Lines' height-weight regulations constitute unlawful sex discrimination under Title VII of the Civil Rights Act of 1964, 42 USC § 2000e et seq. The case was bifurcated and the liability evidence was presented to the court without a jury on June 5, 6, 7, & 9, 1978. After carefully considering and weighing the testimony of the 21 witnesses, the affidavits and testimony of the four expert witnesses, Reynolds, Van Italie, Whaley, and Kolesar, the depositions that were presented for consideration, the plaintiffs' exhibits (1-68 inclusive, except for nos. 26, 29, 36 & 38), the defendant's exhibits (A-FFFF inclusive, except for LL & AAAA), the arguments of counsel as set forth in the pretrial briefs and as developed during the course of the trial, and in the parties' proposed findings of fact and conclusions of law, the court makes the following findings of fact, conclusions of law and decision in accordance with FRCP 52.

Findings of Fact
Parties and Procedure

1. This action was commenced by plaintiff, Air Line Pilots Association, International (ALPA), under Section 706 of Title VII of the Civil Rights Act of 1964, as amended, 42 USC § 2000e-5, and under 28 USC §§ 1337 & 1343(4), and jurisdiction properly lies thereunder.

2. ALPA was initially the certified collective bargaining representative for all flight attendants employed by defendant, United Air Lines, Inc. (United or the Company); on August 18, 1977, the Association of Flight Attendants (AFA), an affiliate of ALPA, replaced ALPA as the collective bargaining representative.

3. Defendant United is a corporation doing business in the Eastern District of New York. United employs more than 15 employees and is subject to the provisions of Title VII.

4. On August 10, 1972, ALPA filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) claiming, inter alia, that United had engaged in unlawful employment practices of sex discrimination on a continuing basis by maintaining and enforcing arbitrary or discriminatory weight standard requirements for female flight attendants employed by United.

5. On April 30, 1973, ALPA received notice from the EEOC, dated April 27, 1973, of its right to sue United pursuant to 42 USC § 2000e-5(e). ALPA filed a timely complaint in this action on July 19, 1973.

6. Between July 1974 and September 17, 1976, the individually named plaintiffs (Sylvia Beeks, Diane Dowling, Norma H. Ross and Beverly Scinto) filed EEOC charges of

sex discrimination based upon United's weight regulation program.

7. By stipulation between ALPA and United, on November 1, 1977 the court ordered that the complaint be amended to add the individually named plaintiffs suing on their own behalf and on behalf of a class defined as all female flight attendants who are employed by United or who may become so employed in the future, and all former female flight attendants who were employed by United on or after October 14, 1971 and were suspended, removed from service, or terminated by United for failure to meet United's flight attendant weight standards. On the same date, the court certified this as a class action pursuant to FRCP 23(b)(2).

8. Pursuant to further stipulation of the parties the court on April 6, 1979 ordered that Lora Bernys, Joyce Cason, K.J. Jakubik, Paula J. Larcey, Clara A. Lukas, Betty Mitchell, Mary Eileen Schaefer and Nancy Tuttle be added as individual plaintiffs, and the complaint was so amended.[14]

The Original Individual Plaintiffs

9. Plaintiff Sylvia Beeks:

a. Is a class representative in this action and has been employed by United as a flight attendant since May 31, 1962. At the time she was hired, she weighed 118 pounds, which was the United maximum for her height of 5'2'.

b. Received three oral warnings from 1971 through November 1973 for weighing 119, 124 and 126 1/2 pounds.

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[14] By further stipulation dated May 31, 1979, Bernadette Mara was added a party plaintiff.

c. Applied for and received in November 1973 a 4 pound "exception" which increased her maximum weight to 122 pounds. At the time she received this exception, she advised United's physician of her entire medical history, including a thyroid condition and the use of medicines and drugs, and believed that the decision was a fair one.

d. Received in 1974 a letter of warning and a letter of charge for exceeding her maximum weight.

e. Received in 1975 a letter of warning for weighing 126 pounds, and a letter of charge resulting in a 5 day suspension for weighing 128 pounds. In October 1975 she was removed from schedule for weighing 132 pounds. Later that year, she received another letter of charge leading to a 10 day suspension for weighing 130 pounds.

f. Received in June 1976 a letter of charge resulting in a 21 day suspension for weighing 124 pounds. Later that year she was removed from schedule for weighing 132 pounds.

g. Did not from November 1973 to June 1977 seek another exception based upon her medical condition or inability to control her weight.

h Applied for an increased exception after her maximum weight had been revised in June 1977 to 123 pounds by virtue of the new weight standards, but did not provide United with relevant information from her personal physician as to the detailed medical grounds on which she sought the exception.

i. Dieted and took water pills, diet pills, and water shots in an effort to lower her weight below United's weight maximum.

10. Plaintiff Diane M. Dowling:

a Is a class representative in this action and a flight attendant employed by United.

b. Was born on October 21, 1939 and was first employed as a flight attendant on August 4, 1965.

c Was given a maximum weight of 118 pounds in 1971.

d Maintained throughout most of 1972 a consistent weight of 118 pounds.

e. Weighed during 1975 between 123 and 140 pounds.

f. Did not indicate to anyone prior to 1975 that her weight fluctuation was related to medical problems or the taking of any medicine, drugs or the like.

g. Requested and received a permanent weight exception of 123 pounds in or about 1975 based on medical advice and opinion of her personal physician.

h. No longer has any weight exception, due to a new set of requirements adopted by United in 1977.

i. Was terminated on two occasions in 1975 for failure to comply with the weight requirements, and thereafter was reinstated with the understanding that none of the events related to termination and reinstatement would be used in any later court proceeding.

j. Received in addition 2 oral warnings, 2 letters of warning, 3 removals from schedule without pay of 8 days, 14 days, and 7 days, respectively, 7 letters of charge, and 4 suspensions without pay of 3 days, 5 days, 15 days and 30 days, respectively.

k. Fasted, and took water pills, water shots and laxatives in an effort to meet her weight maximums.

l. Was told by United's medical department that she could only receive temporary exceptions, and did not receive a permanent exception until January 1976.

11. Plaintiff Norma H. Ross:

a. Is a flight attendant employed by United since 1951 and was born on January 10, 1930.

b. Was advised by her supervisor to lose weight.

c. Was advised by her supervisor that her weight was not acceptable and that action would be taken if she did not meet a certain weight requirement by a given time. When she did not meet that requirement, she was removed from schedule because she weighed 150 pounds.

d. Was advised by her supervisor in July 1970 that her weight was excessive, when she weighed approximately 156 pounds.

e. Was advised by letter on August 17, 1970 that she should reduce at an average loss of two pounds a week to 140 pounds.

f. Was removed from schedule on January 11, 1971 for exceeding her maximum allowable weight. In the same year, she was granted a permanent exception of ten pounds from 136 pounds to 146 pounds and consulted with supervisors regarding a schedule for weight reduction.

g. Applied in 1972 for another weight exception on the basis of medical advice from her personal physician, Dr. Thomas Farthing, who indicated that between 138 and 140 pounds was an acceptable weight for her. In

1973, her maximum allowable weight was increased to 140 pounds, which was 4 pounds over her chart maximum.

h. Received in 1974 another exception which increased her maximum to 145 pounds.

i. Was removed from schedule in July 1974 for weighing 158 pounds. Shortly thereafter she received an additional temporary exception which increased her maximum to 155 pounds.

j. Met with a United physician in March 1975 and agreed with him that 145 pounds was a reasonable maximum for her, given her body structure and age. At that time, she was given a permanent exception to 145 pounds.

k. Was notified in July, August and September of 1975 that she exceeded her maximum allowable weight, but no disciplinary action was taken against her.

l. Received another temporary exception on December 29, 1975 which increased her maximum to 150 pounds for two months.

m. Received in June 1976 another permanent exception which increased her maximum allowable weight to 150 pounds.

12. Plaintiff Beverly Scinto:

a. Was born on October 6, 1946.

b. Was 63' tall and weighed 108 pounds when hired by United.

c. Was weighed on one occasion during the period 1966 to 1970, was found to be 122 pounds, and was asked to lose weight.

d. Had a physical examination on March 25, 1971 and was 63' tall and weighed 118 1/2 pounds.

e. Was terminated in January 1977 but reinstated after an internal appeal process.

f. Applied in 1975 for an exception to the weight program on the basis of her medical history, including a thyroid condition, and was granted a three-pound permanent exception.

g. Weighed between 1971 and 1977 as much as 135 pounds.

h. Was terminated once for failure to meet weight standards, was suspended three times without pay for 3 1/2 days, 15 days and 30 days, respectively, was removed from schedule without pay in two instances, and received lesser forms of discipline.

i. Engaged in severe dieting and received water shots in an effort to comply with United's weight requirements.

United and Its Flight Attendants

13. United is the largest domestic air carrier in the United States, and its business is regulated by the Civil Aeronautics Board and the Federal Aviation Administration.

14. United maintains that "the prime reason for using and having flight attendants on airplanes is to assure that in the event of an emergency or survivable type accident, there will be prompt and efficient emergency action and assistance of passengers immediately available in the cabin. Safety is the prime concern of United Air Lines. Safety is the paramount duty and responsibility of a flight attendant." United also maintains that flight attendants are present on airplanes to

perform additional functions, including passenger service and projection of an image.

15. For safety purposes, regulations of the Federal Aviation Administration require that all flights carrying passengers have a certain number of trained flight attendants on board the aircraft.

16. In addition to a safety function, the duties of a flight attendant include service of food and beverages and assistance of passengers to create a relaxed and pleasant atmosphere in which to travel.

17. Flight attendants are public contact employees whose job includes continuous personal service over varying lengths of time to customers in a special and unique environment and thus are unlike any other airline employees.

18. Flight attendants are expected to maintain a neat and attractive appearance as part of their job. United requires its flight attendants to wear custom-fitted uniforms which are designed to be both attractive and comfortable.

19. United requires ground and inflight personnel to wear specified clothing which identifies them to the public as representatives of United.

20. Since the Civil Aeronautics Board regulates the availability of airline routes and ticket charges, competition between domestic airline carriers is restricted to flight schedules, aircraft fleet and the quality of the service provided to customers by their employees.

21. Flight attendants are the most important public contact employees of United, and their overall job performance influences customer choice in the selection of a flight.

22. Apart from flight schedules, flight attendants are the most important factor in influencing customer choice.

23. United flight attendants are currently domiciled at the following cities: New York, Washington, Miami, Chicago, Denver, Seatle, San Francisco, Los Angeles, Newark, Honolulu and Cleveland.

24. United initially employed individuals as "stewardesses" in 1930.

25. In 1947, United commenced flights to Hawaii. In 1950, United created a position of "Hawaiian steward" or "flight steward" to serve in the cabin of the aircraft along with flight attendants ("stewardesses") on flights to and from Hawaii.

26. Until January 1972, the Hawaiian steward position was limited solely to males as a matter of company policy. In 1972, the position was opened to females after the decision by the Fifth Circuit, Diaz v. Pan American World Airways, Inc., 442 F2d 385 (CA5 1971), cert denied, 404 US 950 (1971), that a carrier's restriction of the flight attendant position to females only violated Title VII. Although the position was nominally opened to females in 1972, United did not thereafter hire anyone, male or female, for the Hawaiian steward position. At all times when the position of Hawaiian steward was maintained, only males occupied the position.

27. By virtue of a consent decree entered on April 30, 1976, in EEOC v. United et al., (ND Ill), the Hawaiian steward position was abolished, and the separate seniority lists for flight attendants and Hawaiian stewards were merged. Individuals previously characterized by United as "Hawaiian stewards" were reclassified as "flight attendants".

28. United now has one classification termed "flight attendant", which includes those positions previously termed "Hawaiian steward", "flight attendant" and "stewardess".

29. The following chart indicates the number of male and female flight attendants and Hawaiian stewards on United's payroll in December 1970-76 and in May 1977:

TABULAR OR GRAPHIC MATERIAL SET AT THIS POINT IS NOT DISPLAYABLE

30. In December 1970, there were 5,816 flight attendants (all female) and 184 Hawaiian stewards (all male) on United's active payroll. During the period from January 1971 through May 1977, United hired the following numbers of flight attendants:

TABULAR OR GRAPHIC MATERIAL SET AT THIS POINT IS NOT DISPLAYABLE

31. 10,562 persons were employed as flight attendants during the period from December 1970 to May 1977. Of these 9,823 were female and 739 were male. In addition, and during the same period, there were 184 males employed in the separate job classification of Hawaiian steward, of whom 123 in 1976 became classified as flight attendants. Thus, a total of 10,746 persons were employed as flight attendants or Hawaiian stewards during the period.

32. In 1970, females constituted 96.93% of the total domestic and Hawaiian flight attendants. Since the initial hiring of males for domestic flight attendant positions, the percentages of females holding this flight attendant position have ranged from 95.7% in December 1972 to 91% in May 1977.

The Hawaiian Route and the Hawaiian Stewards

33. In 1947, United commenced flights to Hawaii, and this route has been United's most profitable market, recently developing 50% of United's profit. With respect to Hawaii, United has used distinctive marketing strategies because its potential customers there differ from those on domestic routes.

34. In 1950 United created the position of Hawaiian steward to create a Hawaiian atmosphere aboard the airplane. They dressed in native outfits, provided some native entertainment, and offered information about the history, geography, legends and tourist attractions of Hawaii.

35. More recently, the Hawaiian stewards wore a "uniform" of slacks and "Hawaiian" shirts that were made of the same material as the mu-mu uniforms of the female flight attendants, who flew with them and performed essentially the same functions, except that some of the Hawaiian stewards played the ukulele and sang for passengers.

36. All Hawaiian stewards were male; the last Hawaiian steward was hired in 1970.

History of the Weight Regulations

37. United maintains appearance standards for its flight attendants, who have extensive visibility and contact with the public. The appearance regulations control, inter alia, the types of accessories which may be worn with the uniform, skirt and pant length, hair styles, facial hair, cosmetics and other aspects of personal hygiene and grooming.

38. The purposes of the appearance standards are to achieve a tasteful uniformity among the flight attendants as representatives of United, and to project a quality image of the flight attendants as clean, healthy, attractive individuals who take pride in themselves and their job. Over the years,

the appearance standards have been modified to reflect changes in style and mode of dress.

39. In each of the 11 United domiciles, there is at least one Appearance Supervisor who is responsible for administering the appearance standards and counseling flight attendants regarding their appearance.

40. Since weight is a factor in appearance, United's appearance control program also includes maximum weight regulations designed to assure that United flight attendants will appear neat and trim in uniform.

41. United's weight regulations are an integral part of the appearance control program and are reasonably related to the overall performance of the flight attendants' job duties.

42. Weight standard requirements are maintained for all of United's flight attendants, including those domiciled within the judicial district in which this action is pending. United has refused to eliminate its flight attendant weight standard requirements and continues to maintain, apply and enforce them.

43. No regulation of the Civil Aeronautics Board or the Federal Aviation Administration either requires or prohibits the maintenance or application by United of weight standard requirements for flight attendants.

44. United maintains separate tables of maximum weights by height for male and female flight attendants. The height/weight charts require that female flight attendants weigh less than male flight attendants of the same height (e.g., a 5' 6' female flight attendant must weigh less than a 5' 6' male flight attendant).

45. United has maintained some form of height/weight requirements for flight attendants since the time it initially hired flight attendants in 1930. There have been a number of

changes made in maximum allowable heights and weights over the years. Prior to World War II, the maximum height for a female flight attendant was 5' 5' and the maximum weight was 120 pounds. In 1944, the maximum height was 5' 6' and the maximum weight was 125 pounds. In 1946, the maximum height was increased to 5' 7' and the maximum weight to 135 pounds. In 1956, the maximum height was 5' 8', and the maximum weight was 138 pounds. In July 1965, the maximum height was increased to 5'9', and the maximum weight was increased to 144 pounds. In June 1972, the maximum height was increased to 6'0 ', and the maximum weight was increased to 156 pounds. In May 1977, the maximum female flight attendant weight was increased to 157 pounds.

46. Prior to 1971 enforcement of United's weight restrictions against the female flight attendants was not strict, nor was it consistent from domicile to domicile.

47. United did not establish for Hawaiian stewards height/weight requirements comparable to those for flight attendants until late 1972.

48. In late 1970, United developed a "more closely monitored" formal weight program for its female flight attendants which was placed into effect in January, 1971. The principal features of the program were: (a) a published height/weight chart was provided which contained an "ideal" range and an "acceptable" range for each height; (b) monthly weigh-ins would be required of all flight attendants to determine if disciplinary action was required; (c) a series of disciplinary guidelines was introduced to deal with flight attendants whose weights exceeded the "acceptable" range for their heights; (d) the disciplinary guidelines provided for the possibility of oral warnings, written warnings, letters of charge, suspensions and terminations for exceeding the maximum allowable weights; (e) flight attendants found to

exceed their "maximums" would be disciplined and would be placed on a weight reduction schedule, and typically expected to lose two pounds per week; (f) flight attendants who exceeded their maximum allowable weights by more than eight pounds would be immediately removed from flight schedule, without respect to whether they had previously been subjected to progressive disciplinary action; (g) "exceptions" to the maximum allowable weight would be considered, and the flight attendant's supervisor would determine whether to grant such an exception after considering the recommendation of the appearance counselor.

49. As a result of revisions to the weight program in May 1971, United revoked 32 "exceptions" previously granted and, by memorandum dated May 7, 1971 instructed local management that the flight attendants who formerly had weight exceptions should be given two to four months, depending upon the allowances previously given, to adjust to the new weight requirements.

50. United maintains a weight card for each flight attendant at the flight attendant's domicile. The weight card records the flight attendant's maximum allowable weight under the published height/weight chart (the "chart" weight); the actual maximum weight allowed, if different from the chart weight; and any "exceptions" allowed to that attendant. Each time the flight attendant is weighed, his or her weight is recorded on the weight card. Corrective or disciplinary action as a result of failure to adhere to the weight standard requirements is also recorded on the weight card.

51. In May 1973, United revised the requirement that all flight attendants be weighed on a monthly basis so that any flight attendants who were three pounds or more below their maximum for three consecutive months need only be

weighed once every four months. Flight attendants may choose to be weighed on any day of the month.

52. The weight program which was implemented for flight attendants in January 1971 was not administered by United against Hawaiian stewards.

53. In March 1972, the weight standards for male stewards were published, because United then began to employ male flight attendants for the domestic market, and United determined that the same weight standards should apply to both domestic and Hawaiian males.

54. Prior to March 1972, United did not remove from schedule, suspend or terminate any Hawaiian stewards (all males) for weight violations, but did remove from schedule, suspend and terminate certain female flight attendants for weight violations.

55. Between March 1972 and April 1976, United suspended one Hawaiian steward for failure to meet weight standards.

56. On April 30, 1976, the Hawaiian steward position was abolished and the separate seniority lists for flight attendants and Hawaiian stewards were merged.

57. United's weight standard requirements for flight attendants, as instituted in 1971, did not allow for interpolations of maximum weights for those flight attendants whose height fell between whole inch gradations (e.g., a flight attendant 5'6 1/2' had to meet the maximum weight for a 5'6' flight attendant). In evaluating requests for "exceptions", United's medical department took the view that, from a medical standpoint, interpolations in maximum weight in such instances had to be considered. In May 1973, the table of maximum allowable weights was amended by United to allow for interpolations between inches of height.

58. Under United's flight attendant weight program, failure to adhere to the maximum allowable weight can result in disciplinary action.

59. The flight attendant height-weight charts maintained by United until May 1977 were derived in part from a table of desirable heights and weights published by the Metropolitan Life Insurance Company.

60. United's male maximums exceed the top limit of the Metropolitan scale for medium-framed males, and are close to the upper limits of the large- framed Metropolitan scale; United's female maximums in no instance reaches the top limit for medium-framed females of the Metropolitan scale, and are substantially lower than the upper limits for large-framed females.

61. Under the 1971 weight program, United employed a formal system of progressive discipline which commenced with an oral warning and ended with termination. Before being suspended, however, any flight attendant found to be overweight was given an opportunity to reduce to the allowable maximum.

62. Under the flight attendant collective bargaining agreement, any discipline imposed for a weight violation could be made the subject of an internal company grievance proceeding.

63. In May 1977, United revised its flight attendant weight standards in certain respects. The maximum allowable chart weights for female flight attendants were increased at all heights. The maximum allowable chart weights for male flight attendants were not changed.

64. Under the May 1977 revisions, former medical exceptions for female flight attendants which were absorbed in the new maximums were considered cancelled. If only a

portion of a medical exception was absorbed by the new maximum weight, the new maximum had the effect of reducing the exception. Any portion of an exception not absorbed by the new maximum weight had to be reaffirmed by the United Medical Department.

65. The May 1977 revisions in maximum chart weights for female flight attendants were based upon the table of maximum weights maintained by Continental Air Lines for its flight attendants. The Continental maximum weights were based upon data on heights and weights of the population at large published by the United States Department of Health, Education and Welfare. That data is found in: U.S. Department of Health, Education and Welfare Public Health Service, "Vital and Health Statistics Series 11, No. 14; Weight by Height and Age of Adults, United States-1960-1962" (published May 1966).

66. United continues to maintain the maximum allowable chart weights adopted in May 1977.

67. The only medical authority consulted by United concerning the establishment, revision, application or enforcement of flight attendant weight standards was United's medical director (and subsequent vice president) Dr. George Kidera who had no expertise in the area of weight control.

68. The weight program introduced by United in January 1971 was not submitted to the United Medical Department or to any other medical authorities for approval prior to its introduction.

69. The weight standards maintained by United do not provide for an automatic increase in maximum allowable weight based upon increase in age.

70. The specific weight maximums which United maintains for its flight attendants are not required by medical considerations.

71. The changes made over the years in United's weight standard requirements have been for reasons unrelated to the performance of flight attendant emergency or safety duties. Those changes have also not been based upon the results of time and motion studies, dexterity tests, or tests relating to stretching ability, mobility, lifting or bending.

72. United claims that the weight standards it maintains for flight attendants are designed to meet the image which United wishes to convey to its passengers.

73. United does not contend that any of the specific weight maximums which United has maintained for its flight attendants has been required for health or safety reasons or for the performance of emergency duties.

74. United has many public contact personnel, such as receptionists, ticket counter personnel, customer service agents, sales personnel, in-flight service supervisors and the like.

75. Neither the specific weight standard requirements for United flight attendants nor any other specific weight standard requirements have been maintained, applied and enforced by United as to other employees.

Administration of Exceptions

76. An "exception" is an allowance for an additional number of pounds which a flight attendant is permitted to weigh over his or her chart maximum, and it can be granted on a temporary or permanent basis.

77. Initially the 1971 weight program eliminated all prior exceptions, but in April 1972, United revised its weight program to again allow for possible exceptions.

78. The foregoing revision was set forth in a United memorandum dated April 27, 1972, which followed the opinion and decision of the System Board of Adjustment in a controversy between ALPA and United involving the grievance of M.C. Lansdale. In the memorandum United announced procedures to be followed by flight attendants in applying for exceptions to the published weight maximums.

79. Any flight attendant may apply for an exception to the weight regulations. The request for an exception is made to United's medical director or to the physician in each United domicile to whom the medical director has delegated responsibility for determining whether an exception should be granted. An exception may be granted only by United's medical department on the basis of a medical problem which is beyond the flight attendant's control (e.g., body build, medication, or medical recuperation). In those instances where a flight attendant is granted an exception to the maximum allowable weight in the United height-weight chart, no disciplinary action can be taken with respect to the person's weight if he or she does not exceed the exception.

80. According to the Medical Director of United, the first exception under the revised program was granted on May 25, 1972.

81. Both males and females are eligible for exceptions, and permanent exceptions have been given to both males and females.

82. Under the exception policy instituted in 1972, a flight attendant desiring an exception was to apply to the company's medical department for review and determination as to the appropriateness of allowing an exception. If an "exception" were granted of eight pounds or less over the individual's maximum allowable weight as set forth in the company's height-weight charts, the flight attendant could continue to fly during the period of the exception.

83. A different exception policy was adopted for Hawaiian stewards. In addition to allowing for exceptions due to "medical conditions", where reduction of a Hawaiian steward's weight to the maximum chart weight "is unrealistic, management with the assistance of UA's [United's] flight surgeon, as required, may establish an individual maximum higher than present standards, provided the exception level does not exceed the individual's height-weight level at the time of employment".

84. After April, all requests for exceptions were ruled upon by the Director of United's medical department. United's medical director did not consider it appropriate to delegate determination of exceptions to the local medical offices at United's various bases, because he believed this would result in having individual judgments enter into the decision-making process, and he did not feel he would be able to promulgate any specific rules and recommendations concerning exceptions to individual doctors.

85. It was the understanding of United's medical director that the maximum allowable exception was 8 pounds over the maximum weight in the United height- weight charts. He never granted an exception which exceeded 8 pounds over

the maximum allowable chart weight and believed that an exception of 2-4 pounds would be adequate if a "medical condition" was found to exist. When the authority to grant or deny exceptions was delegated to doctors at United's various bases, United's local doctors were informed of the policy limiting exceptions to a maximum of 8 pounds over the maximum allowable chart weight.

86. According to United's medical director, determination of the specific amount of an exception to be granted to a flight attendant is, from a medical standpoint, arbitrary and without solid medical basis. It is practically impossible to determine exceptions of 3-4 pounds from a purely medical standpoint. Because the "exception" policy was without solid medical foundation, United's medical director directed that information from a private physician supporting a requested exception be elicited by a lay person rather than by the United medical director, "in order to keep me from appearing medically stupid to my peers."

87. While United purported to apply weight standard requirements to Hawaiian stewards in late 1972, Hawaiian stewards were not disciplined for failure to meet maximum allowable chart weights, and were allowed to exceed the maximum allowable chart weights without the necessity of obtaining "exceptions", at least until December 1973. Between December 1973 and February 1974, exceptions were granted to at least 31 Hawaiian stewards.

88. United granted exceptions to male flight attendants with significantly greater frequency, and for longer periods of time, than it provided to female flight attendants. During the period from 1970 through May 1977, 258 females and 58 males (48 Hawaiian stewards and 10 domestic males) received one or more exceptions. One or more permanent exceptions were given to 199 females and 58 males. 59 females also received one or more temporary exceptions.

89. United's policy, prior to late 1972, of enforcing weight standards for flight attendants and of not enforcing weight standards for Hawaiian stewards was not based upon differences in duties performed by flight attendants and Hawaiian stewards.

90. A considerably higher percentage of males than females received exceptions. As analyzed by Professor Reynolds, based on his study of a sample, 14% of the males received exceptions, in contrast to 5.2% of the females.

91. Of the 258 females who received exceptions, 105 received their initial exceptions in 1976 or 1977, well after the commencement of this litigation, while only 8 of the males received their initial exceptions in 1976 or 1977. Of the 258 females who received exceptions, 59 received exceptions of only temporary duration. All of the exceptions granted to males were of permanent duration.

92. United granted exceptions in significantly greater amounts to male flight attendants than to female flight attendants.

(a) For males, the average exception was 10.2 pounds; the median was 8 pounds. For females, the average exception was 3.3 pounds; the median was 4 pounds.

(b) Of the 199 females who received permanent exceptions, 15 (7.5%) received total permanent exceptions of more than 8 pounds over their chart maximum. Of the 58 males who received exceptions, 27 (46.6%) received total permanent exceptions of more than 8 pounds over their chart maximum; all but 1 of the 27 are former Hawaiian stewards.

(c) In addition to the 15 females who received total permanent exceptions of more than 8 pounds

over their chart maximum, 12 other females were given temporary exceptions of more than 8 pounds over their chart maximum. No males received temporary exceptions.

(d) Of the 258 females who received exceptions (permanent and temporary combined), 27 (10.5%) received exceptions of more than 8 pounds over their chart maximum.

93. During the period from January 1970 through May 1977, in 250 separate instances, 160 flight attendants were given removals from schedule, characterized by United as non-disciplinary, for being more than 8 pounds over their maximum allowable weight.

(a) Of the 160 flight attendants who were removed, 157 were female and 3 were male.

(b) The 157 females were removed from schedule in a total of 247 instances, and the 3 males were removed in a total of 3 instances.

94. During the period from January 1970 through May 1977, 284 flight attendants were given 560 separate disciplinary suspensions for continuing to weigh more than their allowable maximum weight.

(a) Of the 284 flight attendants who were suspended, 279 were female and 5 were male.

(b) The 279 females were suspended in a total of 551 instances, and the 5 males were suspended in a total of 9 instances.

95. During the period from January 1970 through May 1977, 19 flight attendants were terminated as a final step in the disciplinary process for weight violations.

(a) All of the 19 flight attendants who were termianted were female.

(b) In 3 terminations, the flight attendant was terminated for several reasons, one of which was the fact that she exceeded the weight maximums.[15]

(c) One of the terminated flight attendants was terminated, reinstated, and later terminated again.

(d) Not included in the foregoing are 3 other female flight attendants who were terminated but later reinstated with the express agreement that all record of the terminations be expunged from thier personnel files.

96. During the period from January 1970 through May 1977, a total of 367 flight attendants were removed from schedule, suspended or terminated for weight violations.

(a) Of the 367 flight attendants who were removed from schedule, suspended or terminated, 359 were female.

(b) Of the 367 flight attendants who were removed from schedule, suspended or terminated, 8 were male.

97. During the period from June 1, 1977 through April 15, 1978, 66 flight attendants, 64 females and 2 males, were removed from schedule, suspended, or terminated for weight violations.

(a) 33 females were removed in 35 instances and 1 male was removed from schedule in one instance.

(b) 40 females were suspended in 49 instances and 1 male was suspended in one instance.

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[15] ALPA contends that those terminations were for failure to meet the weight standards.

(c) 1 female was terminated.

98. Plaintiffs' statistical expert, Professor Reynolds, analyzed the discipline imposed for failure to meet weight standards during the period 1973- 1975. His analysis was based upon a sample including 10% of the female attendants and 20% of the males, a sampling method not challenged by United. Summarized, his results were that

(a) 13.5% of the females, as opposed to 4% of the males, received disciplinary action resulting in loss of pay or employment, and that more dramatic differences would have been recorded if less severe disciplinary actions had been included.

(b) The severity of discipline imposed on females both initially and for repeat violations during the period was greater than that imposed on males. None of the males was given anything more severe than an oral warning, even up to the fourth incident. For fourth incident females, 32% received oral warnings, 27% written warnings, 18% letters of charge, and 23% removal from service, suspension, or termination.

(c) These figures were neither challenged nor contradicted by United.

99. Both parties sought to compare United's height-weight requirements with various standards. All of the standards proposed by plaintiffs' witnesses related to the general population, although focused upon the relevant age brackets. For example, as reported by Professor Reynolds, the Health Examination Survey conducted by the United States Public Health Service between 1960 and 1962 (HES study) indicates that the following percentages of men and women in the general population would qualify under United's 1971 height-weight standards:

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100. Professor Reynolds also compared United's 1977 height-weight standards with the HES study and reported that the relaxation of United's standards for females minimized the differences in the 25 to 34 year old category, but still left a difference in the 35 to 44 year old category of 41.8% of the males in the general population who would meet United's standards as opposed to 34.5% of the females.

101. Using the same HES study, Professor Kolesar compared United's height- weight standards, not with the general population in particular age groups, but with the men and women who had one or more years of college, because the average educational level of United's flight attendants is two years of college. Professor Kolesar's analysis focused upon the age groups 18 to 24 and 25 to 34. He did not analyze the 35 to 44 year old group as did Professor Reynolds, nor did Professor Reynolds analyze the 18 to 24 year old group as did Professor Kolesar.

102. Professor Kolesar's analysis comparing United's 1971 standards to those in the HES study who had one or more years of college reveals the following percentages of males and females who would meet the United standard:

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THIS POINT IS NOT DISPLAYABLE

103. Making the same comparison under United's 1977 standards, Professor Kolesar reported the following:

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Discussion

Although weight limitations for flight attendants have, in cases where an employer applied them to women and not men, been struck down, Laffey v. North West Airlines, 366 F Supp 763, 773-74, 790 (DDC 1973), 374 F Supp 1382, 1387 (DDC 1974), vacated and remanded in part, affirmed in part, 567 F2d 429 (CADC 1976), and criticized, McArthur v. Southern Airways, Inc., 404 F Supp 508, 522 (ND Ga 1975), vacated and remanded on other grounds, 556 F2d 298; see also Association of Flight Attendants v. Ozark Air Lines, 74 C 1470 (ND Ill May 14, 1979); weight restrictions have been upheld against Title VII sex discrimination attacks on behalf of the female flight attendants of Delta, Cox v. Delta Airlines, Inc., (SD Fla Sept. 30, 1976), aff'd 553 F2d 99, Gerber v. Delta Air Lines, Inc., 76-3766-G (D Mass March 20, 1978), EEOC v. Delta Air Lines, Inc., 441 F Supp 626 (SD Fla 1977), National, In re National Airlines, Inc., 434 F Supp 269 (SD Fla 1977), Continental, Gerdom v. Continental Air Lines, Inc., 18 FEP Cases 1118 (CD Col Nov. 28, 1978), and Eastern Airlines, Jarrell v. Eastern Air Lines, Inc., 430 F Supp 884 (ED Va 1977), aff'd 577 F2d 869 (CA4 1978).

Plaintiffs argue that:

1. United had unlawfully discriminated on the basis of sex in violation of Title VII prior to 1972 because it applied weight standards to its female flight attendants but not to its male Hawaiian stewards who were performing the same job.

2. United's adoption of weight standards for male flight attendants and Hawaiian stewards in 1972 did not cure its Title VII violations because

(a) the 1972 weight standards as written are inherently discriminatory against females, and

(b) United's application and enforcement of its weight standards has disproportionately affected females.

United argues that:

1. Weight standards for flight attendants when used as part of an appearance control program do not fall within Title VII's requirements.

2. United has not discriminated on the basis of sex against female flight attendants because the weight requirements have not had a discriminatory effect on

(a) employment opportunity for females, or

(b) employment conditions for females.

3. United's weight requirements constitute a bona fide occupational qualification for flight attendants.

4. Even if there was in the past discrimination in the adoption or application of the weight requirements, there is none remaining after the adoption of the 1977 requirements.

The liability issues raised by these contentions can best be analyzed in two parts, (a) the validity and (b) the application of United's height-weight requirements.

As to each part, final determination involves a two step analysis. First, it must be determined whether in the circumstances here there has been sex discrimination within the meaning of Title VII of the Civil Rights Act of 1964. If so, the court must then proceed to determine whether the challenged practice can be justified by the defendant. McDonnell Douglas Corporation v. Green, 411 US 792, 802 (1973); Albemarle Paper Company v. Moody, 422 US 405, 425 (1975); Dothard v. Rawlinson, 433 US 321, 97 S.Ct. 2720, 2726-27 (1977); City of Los Angeles Dept. of Water v. Manhart, 98 S.Ct. 1370, 1377 (1978); Earwood v.

Continental Southeastern Lines, Inc., 539 F2d 1349, 1350-51 (CA4 1976); Jarrell v. Eastern Airlines, Inc., 430 F Supp 884, 891 (ED Va 1977), aff'd 577 F2d 869, (CA4 1978).

A. Validity.

ALPA argues that United's weight requirements are discriminatory in a number of ways. First, ALPA argues that the standards are arbitrary, unreasonable, irrational, and designed simply to perpetuate a sex stereotype. United responds that its weight standards are permissible as part of an overall appearance program that is essential to its competitive position in the industry. That an employer may impose reasonable personal appearance requirements upon its employees, and that such standards need not be identical for males and females, are well settled principles. See Earwood v. Continental Southeastern Airlines, Inc., 539 F2d 1349, 1351 and cases cited at Plaintiffs seek to distinguish these cases as "hairlength" cases which related to personal appearance characteristics that were largely voluntary and a matter of personal choice. Weight, plaintiffs argue, should be viewed differently since it is not a characteristic that can be altered at will.

The court agrees that a person's weight is not simply a matter of choice but is the product of many factors, emotional, physical, physiological, and behavioral. In this case, however, except perhaps for the Hawaiian stewards, United's weight requirements were not imposed without notice upon people incapable of meeting them. All of United's female flight attendants and all of its male flight attendants hired after 1971 initially met the weight standards, which have never been made more stringent, and which for females have gradually been relaxed over the years. Since all plaintiffs and class members initially met United's weight standards, the analogy to the "hairlength" cases is much stronger than plaintiffs urge. Significantly, Judge Merhige

did not find persuasive the attempted distinction between the so- called "hair-length" cases and weight standards, Jarrell v. Eastern Airlines, Inc., 430 F Supp 884 (ED Va 1977), aff'd 577 F2d 869 (CA4 1978). Moreover, the evidence establishes that United's standards are reasonable and consistent with accepted medical notions of good health and that they are attainable by the vast majority of United's employees without health hazard.

Second, ALPA argues that the particular standards adopted by United for females are more stringent than those adopted for males. In support ALPA relies on comparisons with the HES study and similar statistical analyses which show that United's standards would permit fewer women than men in the general population to qualify for employment as a United flight attendant. Since the plaintiff class consists only of female flight attendants who have already met United's weight requirements, the class is not comparable to the general population. It is a carefully selected group. Indeed, United readily concedes that it does not select its flight attendants as a cross section of the general population; nor is it required to do so. Comparisons of United's standards with heights and weights in the general population are, therefore, unproductive.

Closer analysis of the HES study as done by Professor Kolesar, shows that if the "relevant labor market", see Hazelwood School District v. United States, 433 US 299, (1977), is viewed as that portion of the general population which has an educational level roughly comparable to that of United's flight attendants, then there is no difference in the percentages of men and women in the 25 to 34 year old group who could meet the United standards and a difference of only 7% in the 18 to 24 year old group. For the two groups combined, that is from 18 to 34 years old, there is a difference of only 2% (men = 54%; women = 52%) in those

who could meet United's height- weight standard. Thus, when the general population surveyed in the HES standard is limited to those with educational levels comparable to United's flight attendants, no discriminatory difference between United's 1971 male and female standards is demonstrated. Indeed, a similar comparison using United's 1977 standards, which liberalized the requirements for females but left the males' unchanged, shows that a larger percentage of females than males in the HES study who had one or more years of college could qualify.

Third, ALPA also argues that United's height-weight standards discriminate because they fail to account for the impact of aging on a woman's ability to maintain a given weight level. While the statistical fact has been demonstrated that as they age women tend to increase more in weight than do men, no cause for the statistical phenomenon has been shown nor have plaintiffs established its inevitability. While the medical experts agreed that weight gain is the result of many interacting factors, there was no evidence that advancing age, by itself, is a cause of weight gain. Consequently, plaintiffs' evidence falls short of proving the standards discriminatory because they do not relax with advancing age.

Central to a Title VII case is the effect or impact of a contested employment practice upon the relevant class. See Gilbert v. General Electric Co., 429 US 125, 162, (1976). Whatever restrictive impact United's height-weight standards might have within the general class of women, it is clear that they have had no detrimental impact on the opportunities of women to be employed as flight attendants at United. Six years after the position was opened to men as well as women, United's flight attendant job was still dominated by women.

Over 90% of United's flight attendants are women, all of whom have met United's weight standards, and 95% of whom have continued to comply with those standards without significant difficulty. True, a small percentage of United's female flight attendants have found great difficulty in meeting the standards. Some have resorted to extreme measures such as crash diets, steam baths, and diuretics in order to meet scheduled weigh-ins. Weight requirements constitute mental and morale hazards for some of the flight attendants. All these facts, however, pertain to the wisdom of United's program; they do not create a Title VII violation. Without such a violation, it is within United's discretion to determine whether the benefits in customer relations, image, and competitive position outweigh the detriments of health risks and morale and disciplinary problems for a small percentage of its flight attendants. With the exercise of that discretion this court is powerless to interfere.

In sum, plaintiffs have failed to establish that either United's 1971 or its 1977 height-weight standards violate Title VII as discriminatory against females. Absent discrimination, there is no need to consider whether there may be justification for any differences which may exist between the male and female standards.

B. Application.

Plaintiff claims that United has not applied its weight standards even- handedly, but instead has discriminated against female flight attendants both in the granting of exceptions and in the administration of discipline for violations. The court concludes that United has applied its exception policies in a manner favoring the Hawaiian stewards in such a way as to constitute discrimination between males and females, but that under the unique circumstances relating to the Hawaiian stewards the granting of more and larger exceptions to them was justified. With

respect to disciplinary actions imposed for violations of its weight standards, the court concludes that United's conduct has discriminated unlawfully against female flight attendants.

1. Exception Policies.

Viewing the Hawaiian stewards and domestic male flight attendants as a single group of males, it is clear that in granting exceptions to the weight standards, United has discriminated against females. Because the number of male and female flight attendants varies for the years in question and because the exceptions granted were not broken down by years, it is difficult to draw precise conclusions from the raw data presented. It has been stipulated that permanent exceptions were granted to 58 males and 258 females. All of the male exceptions were permanent, whereas 199 of the female exceptions were permanent.

When converted to percentage comparisons, the numbers become more significant. In Professor Reynolds' sample, 14% of the males received exceptions while only 5.2% of the females did, a difference that was determined to be highly statistically significant. Professor Kolesar, who used a time weighted analysis, also reported a statistical difference in the exceptions. He found that females constituting 93.9% of the total weighted work force constituted only 81.6% of the total number of persons who received exceptions, whereas males representing 6.1% of the total work force constituted 18.4% of the total number of persons who received exceptions. In short, a higher proportion of males than females received exceptions.

Moreover, for males, both the average exception and the median exception were more than double those for females. Exceptions of 8 pounds or more represented 46.6% of the male exceptions, and only 10.5% of the female exceptions.

On this part of the case, therefore, plaintiffs have met their burden of establishing that United engaged in a discriminatory employment practice in granting exceptions. We turn, then, to the second part of the mandated analysis to determine whether the discriminatory practice can be justified by the defendant. See cases cited at page 37, supra. Professor Kolesar demonstrates that the male favoritism of the exception policy is attributable to one distinct group, the Hawaiian stewards, who received 48 of the 58 male exceptions. There was no discrimination in favor of males who were not Hawaiian stewards. When the number of exceptions granted to the male domestic flight attendants (those who were never Hawaiian stewards) is separately analyzed, it appears that females constituted 95.8% of the domestic work force, but represented 96.3% of the domestic flight attendants who received exceptions. Conversely, males constituted 4.2% of the domestic work force, yet received only 3.7% of the weight exceptions.

No evidence was presented from which the court could evaluate on a statistical basis the magnitude of the exceptions granted the Hawaiian stewards. From individual testimony presented, however, it was apparent that a number of the Hawaiian stewards had been granted exceptions far exceeding the 8 pounds used as a standard for comparison in the stipulated facts. In short, excluding the Hawaiian stewards, there was no discrimination against female flight attendants in the granting of exceptions. When the Hawaiian stewards are included, however, there was such discrimination.

To justify its special treatment of the Hawaiian stewards United points to the history and development of its Hawaiian steward and flight attendant program. For many years the Hawaiian stewards were the only attendants on flight to Hawaii. United's unique approach to the Hawaiian run,

catering to a predominately female market and seeking to create an Hawaiian atmosphere for passengers immediately upon boarding the plane, caused it to hire all males, primarily Hawaiian born, for the position. Until 1972, no weight standards whatsoever were imposed upon Hawaiian stewards. At about that time, United began hiring male flight attendants; eventually it reclassified the Hawaiian stewards as flight attendants. In the meantime, however, and particularly before weight standards were applied to the Hawaiian stewards, many of them had gained considerable weight beyond their hiring weight, and well beyond the generous height-weight standards adopted for male flight attendants in 1971.

Viewing the problem against an increasing awareness of the need for equal treatment of the sexes in employment conditions, United was faced in 1972 with a dilemma. It believed that height and weight standards were in the long run a necessary part of its overall appearance program. It was beginning to employ male flight attendants who were not Hawaiian stewards. If there were to be height-weight standards, United was required by law to see that they did not discriminate between the sexes. See Laffey v. North West Airlines [6 EPD P 8930], 366 F Supp 763. But many of its Hawaiian stewards obviously could not meet any reasonable height-weight standards.

Thus, United had a choice; it could (1) abandon height-weight standards altogether, (2) continue a program that left Hawaiian stewards unaffected by height-weight standards, but apply them to all other flight attendants, (3) discharge many of its Hawaiian stewards who were not only experienced, but also provided the desired Hawaiian flavor to the Honolulu run, or (4) grant substantial exception to those Hawaiian stewards who were unable to meet the standards. United chose the latter course which, the court concludes,

was a reasonable business judgment to make. Its effect was akin to the grandfather clauses frequently adopted in other labor situations where conditions or standards are changed but an existing group is protected against an unfair impact of the change.

United's granting of exceptions to the Hawaiian stewards did not violate Title VII because, although it operated in a manner which discriminated against females, the discrimination was justified in view of the history, the reasonable employment expectations of the Hawaiian stewards, and the special circumstances affecting the Hawaiian run. Dothard v. Rawlinson, 433 US 321 (1977), (upholding regulation excluding women from working as correction officers in maximum security prisons containing sex offenders); Taylor v. Armco Steel Corp., 373 F Supp 885, 909 (DC Tex 1973) (upholding discriminatory rate retention plan in light of morale and production considerations.) For the same reasons United did not violate Title VII during the period before it applied height-weight standards to the Hawaiian stewards and going back to October 14, 1971, the most remote reach of the statute of limitations in this case.

2. Disciplinary Actions

The record establishes that United has discriminated against female flight attendants in imposing discipline for violations of its weight standards. United imposed increasingly severe levels of discipline, varying from oral warnings to terminations, upon flight attendants who failed to meet the weight standards. In this context, however, the weight standard for any individual included any exceptions granted, the purpose of the exception being to exempt the attendant from discipline when his or her weight exceeded the chart maximum but fell within the exception's range.

Professor Reynolds' sample analysis showed that:

(a) some form of discipline for failure to meet weight standards was inflicted on 13.5% of the females but only 4% of the males, a difference found to be highly statistically significant,

(b) although the most severe discipline imposed on any male in the sample was the mildest form, an oral warning, females in the sample received, in addition to oral warnings, more severe forms of discipline, including letters of warning, removals from schedule, suspensions and terminations, and

(c) for repeated violations females were punished more severely than were males.

Professor Kolesar also found a statistically significant difference between the number of females and males penalized by removals from schedule, suspensions or terminations. Although he conceded that the difference is due to factors other than chance, he argued that a small numerical increase in the number of males disciplined would have produced equal treatment.

Apart from the statistical analyses, the raw data on discipline speak loudly for the females. From 1970 through

May of 1977, removals from schedule, suspensions and terminations were inflicted upon 8 males and 359 females. Since the proportion of males to females in those years ranged from 3% in 1970 to 9.5% in 1977, direct comparisons cannot be made. However, discrimination clearly appears during the period from June 1, 1977 through April 15, 1978, when male flight attendants who constituted approximately 9.5% of the work force were only 3% of the people disciplined, and received only 2.4% of the disciplinary actions imposed.

Overall, 19 females were terminated for weight violations during the 8 year period reported, but no males were terminated. In addition, the testimony of several witnesses confirmed United's more lenient attitude toward male violators of its weight enforcement program. In sum, the record is clear that United's enforcement of its weight program has not been even-handed, but instead, has discriminated against females both in the frequency and severity of discipline imposed.

Because United's program calls for discipline for violations of weight standards after they are adjusted by exceptions, there has been no justification offered by United for its discriminatory enforcement against females. Certainly, there could be no such justification grounded in the special circumstances surrounding the Hawaiian stewards, since United's exception policy was designed to make reasonable and fair accommodation to the unique problems of those particular employees. United's granting of exceptions must be taken as its determination of a fair and reasonable standard to which to hold the exception recipient. Once the exception is granted, compliance with the standard as adjusted must follow, or discipline to the violators must be administered in an even-handed way, without discrimination between sexes. On the record before the court, United has

failed to impose discipline without discriminating against female violators, and it has failed to justify the disciplinary differences which have occurred. United, therefore, must be held to have violated Title VII.

Conclusions of Law

1. All conclusions of law appearing under the headings "findings of fact" and "discussion" are incorporated herein by reference.

2. This court has jurisdiction of the action pursuant to 42 USC § 2000e- 5(f).

3. All jurisdictional prerequisites to maintenance of this Title VII action have been satisfied.

4. Venue properly lies in this judicial district.

5. This case has properly been certified as a class action with the class defined as set forth in the findings of fact.

6. Plaintiffs have failed to prove by a preponderance of the evidence that United's 1971 height-weight standards violate Title VII by discriminating on the basis of sex.

7. Plaintiffs have failed to prove by a preponderance of the evidence that United's 1977 height-weight standards violate Title VII by discriminating on the basis of sex.

8. Plaintiffs have proved by a preponderance of the evidence that United's weight exception policies and practices have discriminatorily favored Hawaiian stewards, all of whom were male, but United has justified the discriminatory application on the basis of special circumstances affecting the Hawaiian stewards, with the result that United's exception policies and practices do not violate Title VII.

9. Plaintiffs have proved by a preponderance of the evidence that the disciplinary actions imposed by United in

enforcing its weight program discriminated against the plaintiff class on the basis of sex in violation of Title VII.

SO ORDERED.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 98-15638 and 98-16687

LESLIE FRANK; PAT PARNELL; SUSAN BRODERICK; CAROLE KIRK; NICHKOL MELANSON; SANDRA HUFF; DIANE DAVIS; SHARON BENJAMIN; SHARRON K. TAYLOR; BLAND LANE; JOAN BALLA WEAVER; DONNA DURKIN; ELLEN MCCORMICK,

Plaintiffs-Appellants,

v.

UNITED AIRLINES, INC.,

Defendant-Appellee.

August 11, 2000

Before: REINHARDT, O'SCANNLAIN, AND W. FLETCHER, Circuit Judges

Judge Reinhardt and Judge W. Fletcher have voted to deny the Appellee's petition for rehearing and petition for rehearing en banc, filed July 12, 2000. Judge O'Scannlain voted to grant both.

The full court has been advised of the petition for en banc rehearing, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are **DENIED.**

APPENDIX G

STATUTORY PROVISIONS INVOLVED

The ADEA is codified at 29 U.S.C. §§ 621-634, as follows:

§ 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that--

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting f arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

§ 622. Education and research program; recommendation to Congress

(a) The Secretary of Labor shall undertake studies and provide information to labor unions, management, and the general public concerning the needs and abilities of older workers, and their potentials for continued employment and contribution to the economy. In order to achieve the purposes of this chapter, the Secretary of Labor shall carry on a continuing program of education and information, under which he may, among other measures--

(1) undertake research, and promote research, with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills;

(2) publish and otherwise make available to employers, professional societies, the various media of communication, and other interested persons the findings of studies and other materials for the promotion of employment;

(3) foster through the public employment service system and through cooperative effort the development of facilities of public and private agencies for expanding the opportunities and potentials of older persons;

(4) sponsor and assist State and community informational and educational programs.

(b) Not later than six months after the effective date of this chapter, the Secretary shall recommend to the Congress any measures he may deem desirable to change the lower or upper age limits set forth in section 631 of this title.

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization--

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an

applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization--

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b),(c), or (e) of this section--

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan--

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

(g) Repealed. Pub.L. 101-239, Title VI, § 6202(b)(3)(C)(i), Dec. 19, 1989, 103 Stat. 2233

(h) Foreign practices

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the--

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control, of the employer and the corporation.

(i) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits--

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years or participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan--

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 1056(a)(3) of this title and section 401(a)(14)(C) of Title 26, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title or section 411(a)(3)(B) of Title 26, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of Title 26.

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals or it is a plan permitted by subsection (m).

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(h) of Title 26 and subparagraphs (C) and (D) of section 411(b)(2) of Title 26 shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with respect to the requirements of such sections 411(b)(1)(H) and 411(b)(2) of Title 26.

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 1002(24)(B) of this title and section 411(a)(8)(B) of Title 26.

(9) For purposes of this subsection--

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title.

(B) The term "compensation" has the meaning provided by section 414(s) of Title 26.

(j) Employment as firefighter or law enforcement officer

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken--

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of 1996 if the individual was discharged after the date described in such section, and the individual has attained--

(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or

(B) (i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after September 30, 1996; or

(ii) if applicable State or local law was enacted after September 30, 1996, and the individual was discharged, the higher of--

(I) the age of retirement in effect on the date of such discharge under such law; and

(II) age 55; and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this Act.

(k) Seniority system or employee benefit plan; compliance

A seniority system or employee benefit plan shall comply with this chapter regardless of the date of adoption of such system or plan.

(l) Lawful practices; minimum age as condition of eligibility for retirement benefits; deductions from severance pay; reduction of long-term disability benefits

Notwithstanding clause (i) or (ii) of subsection (f)(2)(B) of this section--

(1) It shall not be a violation of subsection (a), (b), (c), or (e) solely because--

(A) an employee pension benefit plan (as defined in section 1002(2) of this title) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits; or

(B) a defined benefit plan (as defined in section 1002(35) of this title) provides for--

(i) payments that constitute the subsidized portion of an early retirement benefit; or

(ii) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (42 U.S.C. 401 et seq.), and that do not exceed such old-age insurance benefits.

(2) (A) It shall not be a violation of subsection (a), (b), (c), or (e) solely because following a contingent event unrelated to age--

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension; or

(iii) the values described in both clauses (i) and (ii);

are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph (A)(i), the amount of the deduction available pursuant to subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

(C) For purposes of this paragraph, severance pay shall include that portion of supplemental unemployment compensation benefits (as described in section 501(c)(17) of Title 26) that--

(i) constitutes additional benefits of up to 52 weeks;

(ii) has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and

(iii) is discontinued once the individual becomes eligible for an immediate and unreduced pension.

(D) For purposes of this paragraph and solely in order to make the deduction authorized under this paragraph, the term "retiree health benefits" means benefits provided pursuant to a group health plan covering retirees, for which (determined as of the contingent event unrelated to age)--

(i) the package of benefits provided by the employer for the retirees who are below age 65 is at least comparable to benefits provided under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.);

(ii) the package of benefits provided by the employer for the retirees who are age 65 and above is at least comparable to that offered under a plan that provides a benefit package with one-fourth the value of benefits provided under title XVIII of such Act; or

(iii) the package of benefits provided by the employer is as described in clauses (i) and (ii).

(E) (i) If the obligation of the employer to provide retiree health benefits is of limited duration, the value for each individual shall be calculated at a rate of $3,000 per year for benefit years before age 65, and $750 per year for benefit years beginning at age 65 and above.

(ii) If the obligation of the employer to provide retiree health benefits is of unlimited duration, the value for each individual shall be calculated at a rate of $48,000 for individuals below age 65, and $24,000 for individuals age 65 and above.

(iii) The values described in clauses (i) and (ii) shall be calculated based on the age of the individual as of the date of the contingent event unrelated to age. The values are effective on October 16, 1990, and shall be adjusted

on an annual basis, with respect to a contingent event that occurs subsequent to the first year after October 16, 1990, based on the medical component of the Consumer Price Index for all-urban consumers published by the Department of Labor.

(iv) If an individual is required to pay a premium for retiree health benefits, the value calculated pursuant to this subparagraph shall be reduced by whatever percentage of the overall premium the individual is required to pay.

(F) If an employer that has implemented a deduction pursuant to subparagraph (A) fails to fulfill the obligation described in subparagraph (E), any aggrieved individual may bring an action for specific performance of the obligation described in subparagraph (E). The relief shall be in addition to any other remedies provided under Federal or State law.

(3) It shall not be a violation of subsection (a), (b), (c), or (e) solely because an employer provides a bona fide employee benefit plan or plans under which long-term disability benefits received by an individual are reduced by any pension benefits (other than those attributable to employee contributions)--

(A) paid to the individual that the individual voluntarily elects to receive; or

(B) for which an individual who has attained the later of age 62 or normal retirement age is eligible.

(m) Reduction or elimination of supplemental benefits on basis of age

Notwithstanding subsection (f)(2)(B), it shall not be a violation of subsection (a), (b), (c), or (e) solely because a plan of an institution of higher education (as defined in section 1001 of Title 20) offers employees who are serving

under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) supplemental benefits upon voluntary retirement that are reduced or eliminated on the basis of age, if--

(1) such institution does not implement with respect to such employees any age-based reduction or cessation of benefits that are not such supplemental benefits, except as permitted by other provisions of this chapter;

(2) such supplemental benefits are in addition to any retirement or severance benefits which have been offered generally to employees serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure), independent of any early retirement or exit-incentive plan, within the preceding 365 days; and

(3) any employee who attains the minimum age and satisfies all non-age-based conditions for receiving a benefit under the plan has an opportunity lasting not less than 180 days to elect to retire and to receive the maximum benefit that could then be elected by a younger but otherwise similarly situated employee, and the plan does not require retirement to occur sooner than 180 days after such election.

§ 624. Study by Secretary of Labor; reports to President and Congress; scope of study; implementation of study; transmittal date of reports

(a)(1) The Secretary of Labor is directed to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to the Congress. Such study shall include--

(A) an examination of the effect of the amendment made by section 3(a) of the Age Discrimination in Employment Act Amendments of 1978 in raising the upper age limitation established by section 631(a) of this title to 70 years of age;

(B) a determination of the feasibility of eliminating such limitation;

(C) a determination of the feasibility of raising such limitation above 70 years of age; and

(D) an examination of the effect of the exemption contained in section 631(c) of this title, relating to certain executive employees, and the exemption contained in section 631(d) of this title, relating to tenured teaching personnel.

(2) The Secretary may undertake the study required by paragraph (1) of this subsection directly or by contract or other arrangement.

(b) The report required by subsection (a) of this section shall be transmitted to the President and to the Congress as an interim report not later than January 1, 1981, and in final form not later than January 1, 1982.

§ 625. Administration

The Secretary shall have the power--

(a) Delegation of functions; appointment of personnel; technical assistance

to make delegations, to appoint such agents and employees, and to pay for technical assistance on a fee for service basis, as he deems necessary to assist him in the performance of his functions under this chapter;

(b) Cooperation with other agencies, employers, labor organizations, and employment agencies

to cooperate with regional, State, local, and other agencies, and to cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this chapter.

§ 626. Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations

The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation

judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this title through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial.

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed--

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Statute of limitations; reliance in future on administrative rulings, etc.; tolling

Section 259 of this title shall apply to actions under this chapter. If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 630(a) of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

(f) Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum--

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F) (i) the individual is given a period of at least 21 days within which to consider the agreement;

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to--

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such

program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum--

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

§ 627. Notices to be posted

Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Equal Employment Opportunity Commission setting forth information as the Commission deems appropriate to effectuate the purposes of this chapter.

§ 628. Rules and regulations; exemptions

In accordance with the provisions of subchapter II of chapter 5 of title 5, the Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest.

§ 629. Criminal penalties

Whoever shall forcibly resist, oppose, impede, intimidate or interfere with a duly authorized representative of the Equal Employment Opportunity Commission while it is engaged in the performance of duties under this chapter shall be punished by a fine of not more than $500 or by imprisonment for not more than one year, or by both: *Provided, however*, That no person shall be imprisoned under this section except when there has been a prior conviction hereunder.

§ 630. Definitions

For the purposes of this chapter--

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided*, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of

its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization--

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C. § 151 et seq.], or the Railway Labor Act, as amended [45 U.S.C. § 151et seq.]; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. § 401 et seq.].

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C. § 1331 et seq.].

(j) The term "firefighter" means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

(k) The term "law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of a State, including an employee engaged in this activity who is transferred to a supervisory or administrative position. For the purpose of this subsection, "detention" includes the duties of employees assigned to guard individuals incarcerated in any penal institution.

(l) The term "compensation, terms, conditions, or privileges of employment" encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.

§ 631. Age limits

(a) Individuals at least 40 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

(b) Employees or applicants for employment in Federal Government

In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633a of this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age.

(c) Bona fide executives or high policy makers

(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $44,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Equal Employment Opportunity Commission, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

(d) Repealed. Pub.L. 99-592, § 6(b), Oct. 31, 1986, 100 Stat. 3344

§ 632. Annual report to Congress

The Equal Employment Opportunity Commission shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this chapter as he may find advisable. Such report shall contain an evaluation and appraisal by the Commission of the effect of the minimum and maximum ages established by this

chapter, together with its recommendations to the Congress. In making such evaluation and appraisal, the Commission shall take into consideration any changes which may have occurred in the general age level of the population, the effect of this chapter upon workers not covered by its provisions, and such other factors as it may deem pertinent.

§ 633. Federal-State relationship

(a) Federal action superseding State action.

Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.

(b) Limitation of Federal action upon commencement of State proceedings.

In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: Provided, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

§ 633a. Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Office, and the Library of Congress shall be made free from any discrimination based on age.

(b) Enforcement by Equal Employment Opportunity Commission and by Librarian of Congress in the Library of Congress; remedies; rules, regulations, orders, and instructions of Commission: compliance by Federal agencies; powers and duties of Commission; notification of final action on complaint of discrimination; exemptions: bona fide occupational qualification

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission is authorized to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Equal Employment Opportunity

Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall--

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a);

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Equal Employment Opportunity Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil actions; jurisdiction; relief

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices

When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Duty of Government agency or official

Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

(f) Applicability of statutory provisions to personnel action of Federal departments, etc.

Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this Act, other than the provisions of section 631(b) of this title and the provisions of this section.

(g) Study and report to President and Congress by Equal Employment Opportunity Commission; scope

(1) The Equal Employment Opportunity Commission shall undertake a study relating to the effects of the amendments made to this section by the Age Discrimination in Employment Act Amendments of 1978, and the effects of section 631(b) of this title.

(2) The Equal Employment Opportunity Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.

§ 634. Authorization of appropriations

There are hereby authorized to be appropriated such sums as may be necessary to carry out this chapter

Federal Rule of Civil Procedure 23 provides:

Rule 23. Class Actions

(a) Prerequisites to a Class Action

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions

In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be

combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise

A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(f) Appeals

A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

73 CIV. 1082

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Plaintiff,

v.

UNITED AIRLINES, INC.,

Defendant.

STIPULATION

IT IS STIPULATED AND AGREED, by and between plaintiff Air Line Pilots Association, International ("ALPA") and Defendant United Air Lines, Inc., ("United") as follows:

1. The complaint is amended to add Sylvia Beeks, Diane Dowling, Norma H. Ross and Beverly Scinto as individual plaintiffs.

2. The caption of the Amended Complaint shall hence forth read: Airline Pilots Association, International, and Sylvia Beeks, Diane Dowling, Norma H. Ross and Beverly Scinto, on behalf of themselves and other s similarly situated, Plaintiffs, against United Air Lines, Inc., Defendant.

3. To resolve all possible claims of sex discrimination arising out of the weight standards maintained by Untied for its flight attendants, the parties agree that this action may appropriately be treated as a class action. All the requirements of Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure are deemed to be satisfied. The class shall be defined as:

"A. Female Flight Attendants in the employ of United Air Lines, Inc., or who may become so employed in the future."

"B. Former female attendants in the employ of United Air Lines, Inc., on or after October 14, 1971, and who were suspended, removed from service or terminated by United for failure to adhere to United's flight attendant weight standards."

4. Notice in the form attached will be sent or distributed to all members of the class. The Notice will be distributed to class members who are currently employed by United by placement in each class member's Company mailbox. Plaintiff will attempt to give notice to former employees who are members of the class by mailing the Notice to last-known addresses supplied by United. Plaintiff will bear the cost of reproduction of the Notices, and of the mailing referred to above.

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SIMON
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New York, New York 10016
Attorneys for Plaintiff
Air Line Pilots Association,

ROGERS AND WELLS

By: _____
200 Park Avenue
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Attorneys for Defendant
United Air Lines, Inc.

NOTICE OF PENDENCY OF CLASS ACTION ALLEGING SEX DISCRIMINATION AGAINST FEMALE FLIGHT ATTENDANTS BY UNITED AIR LINES, INC.

In July, 1973, the Airline Pilots Association, International ("ALPA"), the collective bargaining representative for the flight attendants employed by United Air Lines, Inc. ("United"), filed an action in the United States District Court for the Eastern District of New York on its own behalf and on behalf of female flight attendants against United. The complaint alleges that United has discriminated, and continues to discriminate, against female flight attendants on the basis of sex in violation of the Civil Rights Act of 1964 with respect to the maintenance and application of its weight standards program for flight attendants. The complaint has been amended to add the following people as individual plaintiffs: Sylvia Beeks, Diane Dowling, Norma H. Ross and Beverly Scinto. The amended complaint has been brought as a class action on behalf of a class defined as follows:

> "A. Female Flight Attendants in the employ of United Air Lines, Inc., or who may become so employed in the future."
>
> "B. Former female attendants in the employ of United Air Lines, Inc., on or after October 14, 1971, and who were suspended, removed from service or terminated by United for failure to adhere to United's flight attendant weight standards."

The amended complaint alleges that United's maintenance and enforcement of weight standards discriminate, as written and as administered, against female flight attendants. In addition, it is alleged that female flight

attendants have been disciplined by United for failure to adhere to the weight standards.

Based on these allegations, the complaint seeks injunctive relief against United to prevent the continuation of such allegedly unlawful employment practices. Plaintiffs also seek back pay compensation for losses suffered by reason of the alleged discriminatory practices and the restoration of all other lost employee benefits, including, among other things, seniority, vacation, sick leave, and pension adjustments.

Defendant United has denied the allegations and maintains that the weight program does not discriminate against female flight attendants. In addition, United opposes the specific relief requested.

This action has been assigned to United States District Judge George E. Pratt, who presided at the United States District Court of the Eastern District of New York, located at 900 Ellison Avenue, Westbury, New York.

On _____, 1977, the Court determined that this suit may be maintained by plaintiffs as a class action on behalf of present and former United Air Lines flight attendants as defined at page 1 of this Notice.

Certification of this lawsuit as a class action means that the legal rights under Title VII of the Civil Rights Act of 1964 of all members of the class will be determined with respect to the alleged sex discrimination by United in connection with weight standards.

You need to do nothing to be included in the class, or to be entitled to any relief the Court may order. However, anyone who disagrees with the position taken by ALPA and the individual plaintiffs in this action may seek to intervene, individually or as a class, as parties to this action.

The plaintiffs who bring this suit and the class are currently represented by the law firm of Cohen, Weiss and Simon, 605 Third Avenue, New York, New York 10016. Any member of the class may, if she so desires, may be represented by her own counsel in this lawsuit. To do so, a written appearance must be entered with the Court by _____.

Finally, please take special note that the Civil Rights Act prohibits any retaliation against any individual for taking any action, including participation in this lawsuit, to enforce rights granted under the statute.

The entire court file in this lawsuit is available for inspection at the Clerk's Office in the United States District Court of the Eastern District of New York, 900 Ellison Avenue, Westbury, New York.

Dated: _____, 1977

Westbury, New York

_____

Lewis Orgel, Clerk

Supreme Court, U.S.
FILED
FEB 2 2001
CLERK

(2)

No. 00-948

In The

Supreme Court of the United States

UNITED AIRLINES, INC.,

Petitioner,

v.

LESLIE FRANK, PAT PARNELL, SUSAN BRODERICK, CAROLE KIRK, NICHKOL MELANSON, SANDRA HUFF, DIANE DAVIS, SHARON BENJAMIN, SHARRON TAYLOR, BLAND LANE, JOAN BALLA WEAVER, DONNA DURKIN and ELLEN McCORMICK, on behalf of themselves and all others similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Appellants/Respondents respectfully submit this Brief in Opposition to the Petition for Writ of Certiorari ("Petition") filed by Appellee/Petitioner United Airlines, Inc. (United), in which they are seeking review of portions of the Ninth Circuit Court of Appeals' decision in *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. 2000), (the "Opinion").

STATEMENT OF THE CASE

The factual and procedural background as set forth in the Opinion is hereby incorporated by reference. Pet.App.1a-6a.

The primary issue for which Petitioner requests a Writ of Certiorari is the preclusive effect of a 1979 judgment in *ALPA v. United Airlines, Inc.*, 26 Fair Empl.Prac.Cas. (BNA) 607 (E.D.N.Y. 1979) ("*ALPA*"). Pet.App.86a-126a.[1]

ALPA was a class action brought on behalf of all present and future female flight attendants at United Airlines, alleging that United's mandatory weight requirements discriminated on the basis of gender.

The present action was filed 12 years after the October 30, 1979 decision in *ALPA* and addresses a new

[1] ALPA (The Air Line Pilots Association) was the union for United's flight attendants. By the end of the litigation ALPA was replaced by the Association of Flight Attendants ("AFA").

weight program which was implemented on February 1, 1980.

Petitioner asserts that the present action is barred under the doctrine of claim preclusion/*res judicata*.

In support of that assertion, Petitioner's description of the *ALPA* litigation and judgment presents a somewhat inaccurate picture. Petitioner goes so far as to misstate that the present action attacks the same weight program adjudicated in *ALPA* and it mischaracterizes the present action as "re-litigation in the California District Court." Pet.5.

A. The *ALPA* Litigation Ended in 1979

Petitioner states that from the early 1970s until July 1994 United maintained a weight program for its flight attendants. In fact, the weight program was changed and a "new weight program" was implemented on February 1, 1980. Judith Hart, United's labor relations representative, states that "As a result of the [*ALPA*] decision, AFA and United negotiated a new weight program. . . . " Appellee/Petitioner's Supplemental Excerpt of Record 31-32 (Declaration of Judith Hart).[2]

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[2] Appellants/Respondents submitted an Excerpt of the Record to the Ninth Circuit (hereinafter, "ER"). Appellee/Petitioner submitted a Supplemental Excerpt of the Record (hereinafter, "P/Supp.ER"). Appellants/Respondents also submitted a Supplemental Excerpt of the Record (hereinafter, "R/Supp.ER").

The district court rejected the claim that the different weight requirements for men and women were discriminatory, but found that United was applying the weight requirements in a discriminatory manner. *ALPA*, Pet.App.125a-126a.[3]

On January 29, 1980, counsel for the Plaintiff class, jointly with counsel for United, wrote to the court informing it that the parties had entered into a settlement by which they would dismiss their appeals and United would revise its weight program. Pet.App.9a, n.5, ER 25,27,41.[4]

Petitioner mischaracterizes the settlement and the new weight program as "compliance with the [*ALPA*] judgment." Pet.4.

Despite the fact that the 1979 *ALPA* judgment held that United discriminated against female flight attendants in its application of the weight program, there is nothing in the judgment which even suggests, much less requires,

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[3] Petitioner points out that the *ALPA* decision compared United's weight requirements to statistics from "the relevant labor market" in a Health Examination Survey conducted by the United States Public Health Service ("HES study") Pet.4. Petitioner fails to acknowledge, however, that the district court defined the "relevant labor market" as men and women in the 25-34 year old age group with one or more years of college, both of which factors lowered the median weights in the HES study. Pet.App.112a, 116a. By 1983 more than half of the female flight attendants at United were over the age of 35. ER 117. Since 1980, flight attendants have only been required to be high school graduates. ER 122.

[4] United terminated its weight requirements in August, 1994.

that United revise its weight program. Pet.App.125a-126a. Indeed, the decision says, " . . . United's exception policy was designed to make reasonable and fair accommodation to the unique problems of those particular employees." Pet.App.124a. When the settlement agreement was presented to the district court, counsel wrote, "Except as reflected in the revised weight program . . . the parties will proceed in accordance with the Court's Decision and Order dated October 30, 1979." ER 41.

B. The Present Action Was Filed In 1992

The present action was filed on February 7, 1992, in the United States District Court for the Northern District of California. It addresses only the new weight program implemented in 1980. ER 142:7.

Pursuant to a stipulation, the gender discrimination claims were certified as a Rule 23(b)(3) class action, alleging violations of 42 U.S.C. § 2000e (Title VII). The class was defined as " . . . all female flight attendants employed by United Airlines currently or in the future and all female flight attendants who were terminated, retired or resigned on or after January 5, 1989, as a result of their failure to comply with United's weight requirements." In addition, the parties stipulated to a class for age discrimination under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*

Initially, on January 19, 1995, the district court for the Northern District of California denied United's "*res judicata* motion." Pet.App.57a. In August, 1995 the court granted United's motion for reconsideration on the

ground that litigation over gender discrimination in the weight requirements was barred by the final judgment in *ALPA*. Pet.App.58a.

In a February 26, 1997 Order, the district court dismissed the disparate impact age discrimination claim, relying on the Tenth Circuit's decision in *Ellis v. United Airlines*, 73 F.3d 999 (10th Cir. 1996). Pet.App.55a.

C. The Ninth Circuit's Decision

On June 21, 2000, a divided panel of the Ninth Circuit reversed the district court on these two issues and also held that Respondents are entitled to summary judgment on their class-wide and individual claims for disparate treatment gender discrimination. ER 19a.[5] United's

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[5] The Ninth Circuit concluded that this case is analytically indistinguishable from *UAW v. Johnson Controls*, 499 U.S. 187, 111 S.Ct. 1196, 113 L.Ed.2d 158 (1991) and *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128 (3d Cir. 1996) and granted Plaintiffs' 1994 motion for summary judgment on the ground that United's mandatory weight maximums were facially discriminatory. Pet.App.15a. The court found that the "uncontroverted evidence" shows that United's weight maximums for women generally corresponded to the medium frame category of the Metropolitan Life Insurance Tables ("MetLife's Height and Weight Tables") for medium frame women while the weight maximums for men corresponded to Metlife's large frame category for men. Pet.App.15a. Petitioner does not dispute this finding, except to say that " . . . there were undoubtedly material issues of fact still in dispute." Pet.26 n.15. The fact that Petitioner cannot identify any material issues of fact still in dispute confirms the Ninth Circuit's finding that the evidence was "uncontroverted." Petitioner incorrectly identifies the 1953 MetLife tables as the source of the comparison. Pet.8.

petitions for rehearing and for rehearing en banc were denied on August 11, 2000.

The Ninth Circuit stated five reasons for its decision that claim preclusion does not bar the present action. The claims in the present action arose after the date of the *ALPA* judgment; the claims in the present action are based on a different weight policy from that challenged in *ALPA;* notice in *ALPA* was not sufficient under Rule 23 to preclude monetary claims in later suits; the post judgment settlement in *ALPA* was not incorporated into a judgment and was never subjected to the scrutiny of a "fairness hearing" and the class representatives in *ALPA* failed to adequately represent the interests of the Plaintiff class in this action. Pet.App.9a-13a.

The decision below also rejected any argument in favor of collateral estoppel/issue preclusion. As in this Petition, United offered nothing more than a footnote stating that issue preclusion was an alternative argument. Pet.App.13a Pet.13 n.7.[6]

The 1983 tables were used in the lawsuit. ER 198. Petitioner is also incorrect in its assertion that the district court in *ALPA* rejected those comparisons based on expert testimony. Pet.8, Pet.App.111a-117a.

[6] The district court based its decision entirely on *res judicata*/claim preclusion. "While intervening changes of fact or law could prevent application of collateral estoppel, they do not preclude *res judicata*." Pet.App.64a. Indeed, Petitioner did not argue issue preclusion/collateral estoppel in the district court and informed the court that it was using the term *res judicata* to mean claim preclusion rather than both claim and issue preclusion. ER 276-277, 278 n.10.

The Ninth Circuit also reversed the district court's Order dismissing Plaintiffs' disparate impact age discrimination claim, remanding to the lower court for further proceedings. Pet.App.19a.

REASONS WHY THE PETITION SHOULD BE DENIED

This Petition for Writ of Certiorari should be denied because, contrary to Petitioner's contention, this case does not present the Court with an opportunity to decide whether members of a "mandatory" Rule 23(b)(2) class are freed from the preclusive effect of a class judgment if they subsequently pursue an action for damages.

This case is not a "subsequent claim for monetary damages" arising from the same cause of action addressed in *ALPA*. On that ground alone this case presents a completely different set of issues from those in *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994) (certiorari dismissed as improvidently granted); *Adams v. Robertson*, 520 U.S. 83 (1997) (certiorari dismissed as improvidently granted) or *Ortiz v. Fibreboard Corp.*, 527 U.S.815 (1999) (decided on other grounds), the cases on which Petitioner relies.

In addition, this Petition should be denied because Petitioner's contention that the decision below makes a fundamental change in preclusion law by relying on "immaterial" changes mischaracterizes the Ninth Circuit's decision.

Petitioner is attempting to create an issue by confusing the doctrines of claim preclusion and issue preclusion. All of the cases it cites to establish a conflict with the Ninth Circuit's reasoning regarding claim preclusion actually address the doctrine of issue preclusion.

Finally, this Petition should be denied with respect to the disparate impact age discrimination issue. The weight program in this case increased a flight attendant's weight maximum by three pounds every ten years between the ages of 25 and 55. That made the weight program an employment policy by which United classified its employees on the basis of age. 29 U.S.C. § 623(a)(2), Pet.App.130a. Although the amount of the weight increase was facially neutral, Plaintiffs allege that it had a disparate impact on flight attendants over the age of 40.

None of the cases Petitioner cites for a conflict among the circuits addresses employment policies which classify employees on the basis of age. They all address disparate impact age discrimination arising from factors which are merely correlated with age.

Furthermore, the disparate impact age discrimination claim has been remanded to the district court for further proceedings. It is effectively a denial of United's motion for summary judgment, which is not a final order. Therefore the issue is not ripe for review by this Court.

I. THE NINTH CIRCUIT'S RULING ON THE PRECLUSIVE EFFECT OF THE *ALPA* JUDGMENT IS IN LINE WITH ESTABLISHED PRINCIPLES OF CLAIM PRECLUSION AND ISSUE PRECLUSION AND DOES NOT CREATE A CONFLICT AMONG THE CIRCUITS

The Ninth Circuit stated five reasons for holding that the present action is not subject to claim preclusion from the 1979 judgment in *ALPA*. They are all well-established principles of preclusion law which do not conflict with Supreme Court precedent or other courts of appeal.

A. Whether Or Not Rule 23(b)(2) Notice May Have A Preclusive Effect On Later Actions Certified Under Rule 23(b)(3) Must Be Considered On a Case By Case Basis To Determine Whether The Prior Action Ensured Protection Of Absent Class Members

In order to craft an argument which makes the Ninth Circuit's decision a portent of the evils of forum shopping and multiple lawsuits, Petitioner greatly exaggerates the effect of the court's conclusion that Rule 23(b)(2) notice in *ALPA* did not create a claim preclusion bar to the present action which is proceeding under Rule 23(b)(3), on a different cause of action, 15 years later.

As the decision below makes clear, this is a "notice" issue. Pet.App.166a-168a. As this Court has said on more than one occasion, whether notice in a prior action is sufficient to bar a subsequent action depends first on whether the prior proceeding " . . . was so devised and applied as to ensure that those present are of the same class as those absent." *Richards v. Jefferson County, Ala.*,

517 U.S. 793, 801, 116 S.Ct. 1761, 1767 (1996). *See also, Hansberry v. Lee*, 311 U.S. 32, 43-44 (1940) (concluding that the procedure and course of litigation did not ensure the full and fair consideration of the common issue).

In this case, the Ninth Circuit held that when the class representatives in *ALPA* agreed to dismiss their appeal they failed to adequately represent the class members who were not seeking reinstatement or back pay in 1979.[7]

Petitioner does not address this issue beyond stating in a footnote that United did not rely on any settlement for its preclusion arguments. Petitioner was at least aware of the issue because the district court relied on it. In its August, 1995, Order, the district court held that the settlement was " . . . an agreed upon disposition by the class." Pet.App.62a.

Dismissal of the appeal made the adverse ruling into a final judgment. Class members had no other options because they were in a Rule 23(b)(2) class action with no right to "opt out."

The fact that it was a post-judgment settlement exacerbated the conflict between the interests of the class

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[7] Plaintiffs in this case were unnamed, absent members of the class in *ALPA*. Pet.App.12a n.6. Class representatives in *ALPA* first appealed the adverse ruling then dismissed it as part of a post-judgment settlement which did not require approval from the court. Pet.App.9a. The Ninth Circuit held that when the class representatives in *ALPA* chose not to appeal, " . . . they abandoned any representation of the interests of those present and future class members in order to protect present class members seeking back pay and reinstatement." Pet.App.12a.

representatives and the remaining class members because it meant that there was no opportunity to object in a "fairness hearing." Pet.App.11a.

Without addressing the merits of Petitioner's concerns about the possibility of class members securing the benefits of class judgments without being bound by them, the fact remains that no such issues are presented by this action.

B. This Action Does Not Present A Claim For Monetary Damages Arising From The Cause Of Action Decided In *ALPA*, Therefore The Ninth Circuit's Conclusion That Rule 23(b)(2) Notice In *ALPA* Does Not Bar This Rule 23(b)(3) Action Does Not Raise The Same Due Process and Preclusion Questions That This Court Previously Granted But Never Resolved In *Ticor Title Insurance Co. v. Brown* or *Adams v. Robertson*.

This action was filed twelve years after the 1979 judgment in *ALPA* and addresses a new weight program implemented in 1980. The decision below says that this action does not address the same weight program so it does not address the same cause of action. Pet.App.10a.

In *Ticor Title Ins. Co.*, 511 U.S. 117 at 120-121, 114 S.Ct. at 1361, and in *Adams*, 520 U.S. 83 at 86, 117 S.Ct. at 1029, this Court certified questions regarding the due process right of class members to opt out of any class action which asserts monetary claims on their behalf. Those cases do not address a new lawsuit on a new cause of action.

That alone defeats Petitioner's argument that this case presents the Court with an opportunity to decide the question it was unable to decide in those cases. Pet.11.[8]

Petitioner argues that "the essential function of certifying a class action under *any* of the subsections of Rule 23, *including* Rule 23(b)(2), is to give the resulting judgment binding effect on all class members under normal principles of *res judicata*." That is exactly what the Ninth Circuit's decision does in this case. Under the normal principles of claim preclusion/*res judicata*, the Rule 23(b)(2) notice in *ALPA* was insufficient to create a bar to this Rule 23(b)(3) action.

C. Petitioner Attempts To Create An Issue By Confusing Claim Preclusion And Issue Preclusion

In a second argument, Petitioner attempts to create the illusion of a conflict with other Circuits and Supreme Court Precedent by confusing the doctrines of claim preclusion and issue preclusion. Petitioner calls it "the Ninth Circuit's new test. . . . " Pet.25.

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[8] Petitioner also cites *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) which is similarly distinguished from this case and was decided on other grounds.

Notably, Petitioner is unable to cite a single case in which any federal court applied claim preclusion to an action arising after the entry of judgment in the preceding action or to a different nucleus of transactional facts. Pet.App.10a. *See Constantini v. Trans World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir. 1982) (setting forth test for identity of claims).

Instead Petitioner resorts to citing case law interpreting issue preclusion in order to create a conflict with the Ninth Circuit's analysis of claim preclusion. *See, e.g., Montana v. United States*, 440 U.S. 147, 157-58, 62 (1979) (determining the appropriate application of collateral estoppel), *EEOC v. American Airlines*, 48 F.3d 164, 166 (1995) (applying collateral estoppel), *Coleman v. C.I.R.*, 16 F.3d 821 (7th Cir. 1994) (relying on the doctrine of collateral estoppel to preclude re-litigation of issues presented in prior litigation).

Petitioner's argument actually highlights the solidity of the Ninth Circuit's reasoning and the fact that there are no grounds for granting Petitioner's request for a Writ of Certiorari.

As it did in its briefs to the district court and the court of appeal, in its Petition to this Court United limits its discussion of issue preclusion/collateral estoppel, to a brief mention in a footnote. Pet.13 n.7, Pet.App.13a, ER 276-277, 278 n.10. The reason is obvious. Issue preclusion does not act as an automatic bar and in this case would require consideration of changes in fact and law in the twelve years between the 1979 *ALPA* judgment and the filing of the present action in 1992. As this Court said in

Montana, "It is, of course, true that changes in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues [citations omitted]. *Id.* at 159, 99 S.Ct. at 975.

Petitioner confines its argument to only one of the changes in facts essential to the *ALPA* judgment, calling the two pound increase in weight maximums "immaterial."[9] There were other changes in facts, however, which were indisputably "material" to the *ALPA* judgment.

In *ALPA* the district court relied on statistical comparisons to the "relevant labor market" within the "HES study" conducted in 1962. The court defined the "relevant labor market" as men and women in the 25-34 year old age group with one or more years of college. Both of those factors lowered the median weights in the HES study. Pet.App.112a, 116a.

Those statistics are no longer comparable, not only because they were thirty years old when this action was filed but also because by 1983 more than half of United's female flight attendants were over the age of 35. Furthermore, since 1980 United has only required that flight

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[9] Petitioner's characterization of this change as "immaterial" is insufficient to establish issue preclusion but it does support the Ninth Circuit's conclusion that the 1979-1980 settlement of the *ALPA* litigation, which consisted of the implementation of this new plan and dismissal of the appeals, "abandoned" the interests of class members who were not seeking reinstatement or back pay in 1979. The only benefit they received from the settlement was this change in weight maximums which Petitioner characterizes as "immaterial" and another increase of three pounds every ten years.

attendants be highschool graduates. ER 117, 122. Age and education made a significant difference in the median weights in the HES study and in the district court's decision in *ALPA*. Pet.App.112a, 116a.

D. Petitioner Confines Its Request To Preclusion Issues And Does Not Request A Writ of Certiorari To Review The Ninth Circuit's Decision That Plaintiffs Are Entitled To Summary Judgment On Their Disparate Treatment Claim

Petitioner does not request a Writ of Certiorari to review the Ninth Circuit's holding that the gender discrimination class is entitled to summary judgment on their disparate treatment claim.

In a footnote, Petitioner states that the Ninth Circuit erred in granting Respondents' motion for summary judgment because there were "undoubtedly" material issues of fact still in dispute. Pet.26 n.15. The fact that Petitioner is unable to identify any of those issues confirms the decision below.

II. THE NINTH CIRCUIT HAS REMANDED THE DISPARATE IMPACT AGE DISCRIMINATION CLAIM FOR FURTHER PROCEEDINGS MAKING REVIEW BY THIS COURT PREMATURE

A. United's Weight Program Was An Employment Policy Which Classified Employees By Age

In addition to certifying a class for gender discrimination the district court certified a class for age discrimination.

In 1997 the district court dismissed all of Respondents' age discrimination claims, including its claim of disparate impact age discrimination.

In the decision below the Ninth Circuit remanded the disparate impact claim for further proceedings.[10]

Petitioner requests a Writ of Certiorari on the ground that several other circuits are in conflict over whether disparate impact is cognizable under the ADEA. That argument must fail, however, because not one of the cases Petitioner cites addresses disparate impact age discrimination arising from an employment practice which classifies employees on the basis of age.[11] 29 U.S.C. § 623(a)(2).

United acknowledges that weight increases with age. Therefore, the weight program automatically increased a flight attendant's weight maximum by three pounds every ten years between the ages of 25 and 55. P/Supp ER 32:14-16. The increases constituted a facially neutral employment policy which classified employees on the basis of age and had a disparate impact on the protected class.[12]

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[10] The disparate impact age discrimination claim will have little if any effect on the class members because damages are limited to lost wages. The same damages are now recoverable by female flight attendants in the gender discrimination class.

[11] The weight program at issue in this case is not the same program the Tenth Circuit reviewed in *Ellis v. United Airlines*, 73 F.3d at 1006 (stating that weight requirements for new hires disregard age entirely, while the weight standards for employees make allowances for weight gain according to age).

[12] In the decision below, the Ninth Circuit affirmed the district court's dismissal of Plaintiffs' disparate treatment

B. The Disparate Impact Age Discrimination Issue Is Not Ripe For Review By This Court

The Ninth Circuit remanded the disparate impact age discrimination issue for further proceedings before the district court. Pet.App.19a.

In 1995 the district court denied Defendants' motion for summary judgment on Plaintiffs' disparate impact age discrimination claim, saying,

> But United could discriminate on the basis of age even while allowing for *some* weight increases for older employees, if the increases are insufficient to account for relevant differences between younger and older workers. . . . The age discrimination claim presents factual issues under both disparate treatment and disparate impact analyses. . . . Pet.App.65a-66a.

Until those issues of fact have been decided, there is no final order on Respondents' disparate impact age discrimination claim and it is not ripe for review by this Court. *See, e.g., Catlin v. U.S.*, 324 U.S. 229 (1945) (limiting appellate review to "final decisions" which end the

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claims on the ground that the weight policy discriminated on the basis of sex and weight, factors which are merely empirically correlated with age. Pet.App.19a.

The fact that Petitioner's intentional discrimination was motivated by factors merely correlated with age does not diminish Respondents' allegation that the weight program's allowances for age were facially neutral but had a disparate impact on flight attendants over the age of 40.

litigation on the merits and leave nothing for the court to do but execute the judgment.)

CONCLUSION

For the foregoing reasons, the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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February 2, 2001.

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No. 00-948

IN THE

Supreme Court of the United States

UNITED AIRLINES, INC.,
Petitioner,

v.

LESLIE FRANK, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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IN THE

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No. 00-948

UNITED AIRLINES, INC.,
Petitioner,

v.

LESLIE FRANK, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37.1 and .2 of the Rules of this Court, the Equal Employment Advisory Council respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* in support of the position of Petitioner in this case. The written consent of Petitioner United Airlines, Inc. has been filed with the Clerk of the Court. Counsel for Respondents Leslie Frank, Pat Parnell, Susan Broderick, Carole Kirk, Nichkol Melanson, Sandra Huff, Diane Davis, Sharon Benjamin, Sharron K. Taylor, Bland Lane, Joan Balla Weaver, Donna Dirkin, and Ellen McCormick has refused consent.

In support of its motion, EEAC by the following shows that this brief brings relevant matters to the attention of the

Court that have not already been brought to its attention by the parties:

1. The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community and includes over 340 of the nation's largest private sector corporations.

2. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

3. All of EEAC's members are employers subject to the Age Discrimination in Employment Act of 1967 (ADEA), *as amended*, 29 U.S.C. § 621 *et seq.*, as well as other equal employment statutes and regulations.

4. As employers, and as potential respondents to employment discrimination claims, EEAC's members have a strong interest in the issue presented for the Court's consideration regarding whether, as the court below ruled, the "disparate impact" theory of discrimination is available under the ADEA.

5. The lack of consistency in the courts regarding whether disparate impact claims of discrimination may be brought under the ADEA, and if so under what circumstances, creates substantial uncertainty in an area of law that is of great importance to the business community. As a direct consequence of the circuit court divide on this issue, many employers are constrained in their ability not only to conduct business in a uniform

manner, but also to monitor their business practices for EEO compliance.

6. EEAC's member companies, most of which conduct business in all or most of the federal judicial circuits, are strongly committed to equal employment opportunity and seek to establish and enforce internal policies that are consistent with federal employment non-discrimination laws.

7. As part of that commitment, these companies seek to develop and implement nondiscriminatory personnel policies and practices at each of their business sites, irrespective of location. This effort is undermined where there is inconsistency and instability in the applicable law, as is presently the case on the fundamental issue of disparate impact under the ADEA. The Ninth Circuit's ruling below only adds to the conflict in this area of the law.

8. Because of this interest, EEAC has filed *amicus curiae* briefs in cases addressing this issue in several circuit courts of appeals. It also has participated in a number of other cases before this Court in which important public policy issues involving the ADEA were presented.

9. Thus, EEAC has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Because of its experience in these matters, EEAC is well situated to brief the Court on the implications of the issues beyond the immediate concerns of the parties to the case.

WHEREFORE, for the reasons stated, the Equal Employment Advisory Council respectfully requests that the Court grant it leave to file the accompanying brief *amicus curiae*.

Respectfully submitted,

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February 2, 2001

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae*, contingent upon the granting of the accompanying motion for leave. The brief supports the petition for a writ of certiorari.[1]

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community and includes over

[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

340 of the nation's largest private sector corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to the Age Discrimination in Employment Act of 1967 (ADEA), *as amended*, 29 U.S.C. § 621 *et seq.*, as well as other equal employment statutes and regulations. As employers, and as potential respondents to employment discrimination claims, EEAC's members have a strong interest in the issue presented for the Court's consideration regarding whether, as the court below ruled, the "disparate impact" theory of discrimination is available under the ADEA.

Because of this interest, EEAC has filed *amicus curiae* briefs in cases addressing this issue in several circuit courts of appeals. *E.g.*, *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948 (8th Cir. 1999); *Hiatt v. Union Pac. R.R.*, 65 F.3d 838 (10th Cir. 1995); *EEOC v. Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984). EEAC also has participated in a number of other cases before this Court in which important public policy issues involving the ADEA were presented. *E.g.*, *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993); *Public Employees Ret. Sys. v. Betts*, 492 U.S. 158 (1989); *Shell Oil Co. v. Dartt*, 434 U.S. 99 (1977).

Thus, EEAC has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of its experience in these matters, EEAC is well situated to brief the Court on the implications of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

The respondents are current and former employees of the petitioner, United Airlines ("United"). From 1980 to 1994, United maintained an employment policy under which flight attendants were required to comply with maximum body weight limitations. Flight attendants who exceeded the maximum weight requirements were subject to discipline, up to and including termination.

Respondents filed a class action lawsuit claiming, *inter alia*, that United's weight restriction policy had a disproportionately adverse impact on older workers in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* The United States District Court for the Northern District of California properly dismissed respondents' disparate impact claims, determining that such actions are not cognizable under the ADEA.

Relying on an earlier Ninth Circuit decision in *Arnett v. California Pub. Employees Ret. Sys.*, 179 F.3d 690, 696-97 (9th Cir. 1999), *vacated on other grounds*, 528 U.S. 1111 (2000), a divided Ninth Circuit panel reversed and remanded the District Court's decision, ruling that claims asserting a disparate impact theory of discrimination may be brought under the ADEA. United has now petitioned this Court for a writ of certiorari.

SUMMARY OF REASONS FOR GRANTING THE WRIT

This case presents the Court with the opportunity to resolve a fundamental question of employment law on which federal circuit courts are deeply divided, that is, whether the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, provides a cause of action under a "disparate impact" theory of employment discrimination. Relying on this Court's rationale in *Hazen Paper v. Biggins*, 507 U.S. 604 (1993), the First, Seventh and Tenth Circuit Courts of Appeals have ruled

that it does not.[2] *Mullin v. Raytheon Co.*, 164 F.3d 696 (1st Cir. 1999), *cert. denied*, 528 U.S. 811 (1999); *EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073 (7th Cir. 1994); *Ellis v. United Airlines, Inc.*, 73 F.3d 999 (10th Cir. 1996). In contrast, the Second and Eighth Circuits, like the court below, have allowed such actions to proceed. *District Council 37 v. New York City Dep't of Parks & Recreation*, 113 F.3d 347 (2d Cir. 1997); *Smith v. City of Des Moines*, 99 F.3d 1466 (8th Cir. 1996).

Given the conflicting decisions of the federal appellate courts, the matter of whether or not disparate impact claims are available under the ADEA is ripe for resolution by this Court.

The lack of consistency in the courts regarding whether disparate impact claims of discrimination may be brought under the ADEA, and if so under what circumstances, creates substantial uncertainty in an area of law that is of great importance to the business community. As a direct consequence of the circuit court divide on this issue, many employers are constrained in their ability not only to conduct business in a uniform manner, but also to monitor their business practices for EEO compliance.

EEAC's member companies, most of which conduct business in all or most of the federal judicial circuits, are strongly committed to equal employment opportunity and seek to establish and enforce internal policies that are consistent with federal employment non-discrimination laws. As part of that commitment, these companies seek to develop and implement nondiscriminatory personnel policies and practices at each of their business sites, irrespective of

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[2] Additionally, although they have not squarely decided the issue, the Third and Sixth Circuits have expressed skepticism over the viability of disparate impact claims under the ADEA. *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 732-34 (3d Cir. 1995); *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1048 (6th Cir. 1998).

location. This effort is undermined where there is inconsistency and instability in the applicable law, as is presently the case on the fundamental issue of disparate impact under the ADEA. The Ninth Circuit's ruling below only adds to the conflict in this area of the law.

Moreover, the decision below is inconsistent, and arguably conflicts, with this Court's decisions in *Hazen Paper* and *Gunther*, which both support the principle that disparate impact actions are not available under the ADEA. *Hazen Paper v. Biggins*, 507 U.S. 604 (1993); *County of Washington v. Gunther*, 452 U.S. 161 (1981). Specifically, while it did not squarely resolve the issue, *Hazen Paper* raises serious doubt about the viability of disparate impact claims under the ADEA. So too does this Court's ruling in *Gunther* that the disparate impact theory of discrimination is unavailable under the Equal Pay Act, 29 U.S.C. § 206(d), where the conduct complained of is based on a factor "other than sex." 452 U.S. at 170-71. Given that the EPA's "factor[] other than sex" and the ADEA's "reasonable factor other than age" defenses are virtually identical, this Court's rationale in *Gunther* should apply to preclude disparate impact claims brought under the ADEA.

For the foregoing reasons, this Court should grant the petition and reverse the Ninth Circuit's decision below.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' HOLDING THAT DISPARATE IMPACT CLAIMS OF DISCRIMINATION ARE AVAILABLE UNDER THE ADEA DIRECTLY CONFLICTS WITH DECISIONS OF THE FIRST, SEVENTH, AND TENTH CIRCUIT COURTS OF APPEALS ON AN ISSUE OF SUBSTANTIAL IMPORTANCE TO THE EMPLOYMENT COMMUNITY

A. The First, Seventh and Tenth Circuits Hold That Disparate Impact Claims Are Not Cognizable Under the ADEA

Relying on this Court's rationale in *Hazen Paper v. Biggins*, 507 U.S. 604 (1993), the U.S. Courts of Appeals for the First, Seventh, and Tenth Circuits unequivocally have ruled that disparate impact discrimination claims are not cognizable under the ADEA. *Mullin v. Raytheon Co.*, 164 F.3d 696, 699-704 (1st Cir. 1999); *EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073, 1076-78 (7th Cir. 1998); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1006-10 (10th Cir. 1996). While this Court acknowledged in *Hazen Paper* that it has yet to resolve this issue squarely, 507 U.S. at 604, the analysis strongly suggests that actions brought under the ADEA are limited to those involving disparate treatment. *See, e.g., Ellis*, 73 F.3d at 1009 ("one cannot read [*Hazen Paper*] without receiving the strong impression that the Supreme Court is suggesting that the ADEA does not encompass a disparate impact claim")(footnote omitted).

Additionally, while declining to reach the issue on its merits, the Third and Sixth Circuits have expressed doubt, in the wake of *Hazen Paper*, over the viability of disparate impact discrimination claims under the ADEA. *See DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 732 (3d Cir. 1995) ("[I]n the wake of *Hazen*, it is doubtful that traditional disparate impact theory is a viable theory of liability under

the ADEA."); *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1048 (6th Cir. 1998) ("[T]here is now 'considerable doubt as to whether a claim of age discrimination may exist under a disparate impact theory.'")(quoting *Lyon v. Ohio Educ. Ass'n & Prof'l Staff Union*, 53 F.3d 135, 139 n.5 (6th Cir. 1995)).

B. The Second, Eighth, and Ninth Circuits Have Ruled that Disparate Impact Claims Are Available Under the ADEA

In direct conflict with the First, Seventh and Tenth Circuits, the Second, Eighth, and Ninth Circuits continue to rely on pre-*Hazen* precedent to allow disparate impact causes of action under the ADEA. *District Council 37 v. New York City Dep't of Parks & Recreation*, 113 F.3d 347, 351 (2d Cir. 1997); *Smith v. City of Des Moines*, 99 F.3d 1466, 1469-70 (8th Cir. 1997); *Arnett v. California Pub. Employees Ret. Sys.*, 179 F.3d 690, 696-97 (9th Cir. 1999), *vacated and remanded on other grounds*, 528 U.S. 1111 (2000).

Unlike the Ninth, however, the Second and Eighth Circuits have limited the circumstances under which such an action may proceed. *Criley v. Delta Air Lines, Inc.*, 119 F.3d 102, 105 (2d Cir. 1997); *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 951 (8th Cir. 1999). In particular, neither circuit will allow a disparate impact action under the ADEA where the complained-of policy or practice disproportionately disadvantages only a sub-group of persons within the protected class. *Id.* Thus, if a challenged company policy is alleged to have a disparate impact only on workers who are 50-plus years old and not the entire class of individuals age 40 or more, the Second and Eighth Circuits have ruled that such a claim is outside the scope of ADEA coverage. *Id.*

In *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948 (8th Cir. 1999), the Eighth Circuit reasoned:

> [I]f disparate-impact claims on behalf of subgroups were cognizable under the ADEA, the consequence would be to require an employer engaging in an RIF to attempt what might well be impossible: to achieve statistical parity among the virtually infinite number of age subgroups in its work force. Adoption of such a theory, moreover, might well have the anomalous result of forcing employers to take age into account in making layoff decisions, which is the very sort of age-based decision-making that the statute proscribes. . . We have held that employment decisions motivated by factors other than age (such as retirement eligibility, salary, or seniority), even when such factors correlate with age, do not constitute age discrimination. We certainly do not think that Congress intended to impose liability on employers who rely on such criteria just because their use had a disparate impact on a subgroup.

McDonnell Douglas at 951 (citations omitted).

The Eighth Circuit's rationale in *McDonnell Douglas* begs the broader question: at what point does an employer's reliance on factors other than age rise to the level of impermissible disparate impact discrimination under the ADEA? In the absence of a definitive ruling from this Court that disparate impact is not cognizable under the ADEA, the answer to that question will continue to vary from court to court, at least within the jurisdictions that now recognize disparate impact claims under the ADEA.

The Second and Eighth Circuits' partial application of the disparate impact theory of discrimination to ADEA cases essentially creates a split-within-splits of opinion as to whether such claims are viable, and only adds to the confusion and unpredictability of the law in this area.

C. The Inconsistency Among Courts on the Issue of Whether Disparate Impact Discrimination Claims Are Available Under the ADEA Substantially Undermines Employers' Efforts To Develop and Enforce EEO-Compliant Business Practices

The lack of consistency in the courts regarding whether, and under what circumstances, disparate impact claims of discrimination may be brought under the ADEA creates substantial uncertainty in an area of law that is of great importance to the business community. EEAC member companies, most of which conduct business in multiple circuits, are strongly committed to equal employment opportunity and seek to establish and enforce internal policies that are consistent with federal employment non-discrimination laws.

As part of that commitment, these companies seek to develop and implement nondiscriminatory personnel policies and procedures at each of their business sites, irrespective of location. This effort is undermined when there is inconsistency and instability in the laws that apply to various locations, as is presently the case on the issue of disparate impact under the ADEA. As a consequence, many employers are constrained in their ability not only to apply internal policies in a uniform manner, but also to self-monitor for EEO compliance.

Unlike race or sex, which are immutable characteristics, age is a progressive condition that affects all individuals. Most if not all workers eventually will attain the age of 40, joining the class of individuals protected under the ADEA, and continue to age for no reason other than the passage of time. Prudent employers typically monitor the impact of their selection practices on minorities and women as an early warning device to avoid potential liability under Title VII. For employers doing business in those circuits that recognize a disparate impact cause of action under the ADEA, prudence

would seem to dictate that they do the same for age. In practice, however, achieving statistical parity by age is an impossible task, since it is constantly changing and never static from one day to the next.

Moreover, while any employer's workforce can be divided neatly into two groups—those within the ADEA's protected class and those who aspire to be—conducting a statistical analysis to identify adverse impact is not so simple. Under this Court's decision in *O'Connor v. Consolidated Coin Caterers*, 517 U.S. 308 (1996), the comparator for the purposes of assessing potential age discrimination need not be outside the protected class, *i.e.*, under 40. Accordingly, to monitor fully every conceivable age disparity, an employer would have to make a statistical comparison of the impact of each selection criterion on employees of every age to employees of every other age. Since a meaningful statistical comparison requires a sufficient sample size, this calculation would actually degenerate to a mere cohort analysis—in other words, a disparate treatment analysis. As the Second and Eighth Circuits have concluded, comparing age sub-groups simply does not work.

Also unlike other protected characteristics, age often is correlated to legitimate criteria such as seniority, salary and the like, which routinely are used by employers as means of differentiating employees. Because of the progressive nature of age, these facially neutral policies necessarily will have a different impact on different individuals depending on their age at the time the business decision is made. *Ellis*, 73 F.3d at 1009; *see also* Note, *Mullin v. Raytheon Company: The Threatened Vitality of the Disparate Impact Theory Under the ADEA*, 52 Me. L. Rev. 149, 171 (2000).

In the jurisdictions that now recognize disparate impact claims under the ADEA, employers may be severely hampered, for instance, in their ability to manage business downturns through the use of layoffs or reductions in force.

In jurisdictions where such a cause of action is not allowed, however, those same businesses are free to make reasonable decisions that are critical to sustained business success, even if the decisions are based on factors indirectly related to age.

Because of the increasingly conflicting rules of law among the jurisdictions in which they conduct business, EEAC member companies have a unique interest in having the matter finally adjudicated and resolved by this Court.

II. THE COURT OF APPEALS' DECISION IS INCONSISTENT, AND ARGUABLY CONFLICTS, WITH THIS COURT'S PRIOR RULINGS IN *HAZEN PAPER* AND *COUNTY OF WASHINGTON v. GUNTHER*

A. *Hazen Paper* Raises More Than a Specter of Doubt About the Availability of Such Claims

In *Hazen Paper v. Biggins*, 507 U.S. 604 (1993), this Court ruled that legitimate business decisions only indirectly correlated with age do not violate the ADEA under a disparate treatment theory of discrimination. Noting that "[t]he disparate treatment theory is of course available under the ADEA, as the language of that statute makes clear," the Court determined that an employer cannot be liable under that theory if its conduct was motivated by a factor other than age. *Hazen Paper*, 507 U.S. at 609.

The Court explained:

> Disparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA. . . . Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes. . . . When the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if

> the motivating factor is correlated with age, as pension status typically is.

Id. The Court also noted, "[b]y contrast, we have never decided whether a disparate impact theory of liability is available under the ADEA and we need not do so here." *Id.* (citation omitted). Taken together, this language strongly suggests that a disparate impact claim based on a criterion other than age likewise would not be viable under the ADEA.

Indeed, in his concurring opinion, Justice Kennedy cautioned:

> [N]othing in this Court's opinion should be read as incorporating in the ADEA context the so-called "disparate impact" theory of Title VII. . . . [W]e have not yet addressed the question whether such a claim is cognizable under the ADEA, and there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA.

Hazen Paper, 507 U.S. at 618 (citations omitted). Thus, while this Court in *Hazen Paper* did not squarely resolve the issue, Justice O'Connor, writing for a unanimous Court, and Justice Kennedy in his concurring opinion, raise serious doubt about the viability of disparate impact claims under the ADEA.

As noted above, a number of courts have relied on *Hazen Paper* to reach the logical conclusion that while disparate treatment claims are available under the ADEA, disparate impact claims are not. To the extent that the Ninth Circuit chose to ignore this Court's pronouncements in *Hazen Paper* and instead looked for guidance to its own prior decisions, which rely on pre-*Hazen* precedent, its decision below is incorrect.

B. This Court's Holding in *County of Washington v. Gunther* Stands for the Proposition That Disparate Impact Claims Are Not Allowed Where a Decision Based on Factors Other Than Protected Class Membership Is Expressly Permitted by Statute

The Ninth Circuit's decision below is inconsistent, at best, with this Court's holding in *County of Washington v. Gunther*, 452 U.S. 161 (1981), that the disparate impact theory of discrimination is unavailable under the Equal Pay Act ("EPA"), 29 U.S.C. § 206(d), where the conduct complained of is based on a factor "other than sex." Contrasting the EPA with Title VII of the Civil Rights Act of 1964, the Court noted:

> Title VII's prohibition of discriminatory employment practices was intended to be broadly inclusive, proscribing not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The structure of Title VII litigation . . . has been designed to reflect this approach. The fourth affirmative defense of the Equal Pay Act, however, was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination. Equal Pay Act litigation, therefore, has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of "other factors other than sex."

Gunther at 169 (citations omitted)(footnote omitted). Thus, an employer that makes an employment decision based on some factor "other than sex" will not violate the EPA, even if that factor has a disproportionately adverse impact on women.

The ADEA contains an affirmative defense to liability that is strikingly similar to that found in the EPA. It provides, in relevant part:

> It shall not be unlawful for an employer . . . to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where . . . the differentiation is based on reasonable factors other than age. . . .

29 U.S.C. § 623(f)(1). Thus, like the EPA, the ADEA provides a specific statutory exception to liability for discrimination where the complained of conduct is based on "reasonable factors other than age." *Id.*

Accordingly, several courts have relied on *Gunther* as further support for disallowing disparate impact claims under the ADEA. *Mullin v. Raytheon Co.*, 164 F.3d 696, 702 (1st Cir. 1999); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1008 (10th Cir. 1996). In *Mullin*, for instance, the First Circuit reasoned:

> When the ADEA's general prohibition and the statutory exception are read in *pari materia*, as a unified whole, the prohibition forbids disparate treatment based on age and the exception authorizes disparate impact. Thus, Professor Laycock's commentary, made in the Equal Pay Act context, applies equally to the ADEA: "The prohibition and the exception appear identical. The sentence is incomprehensible unless the prohibition forbids disparate treatment and the exception authorizes disparate impact."

164 F.3d at 702 (citations omitted). *Cf. Markham v. Geller*, 451 U.S. 945, 949 (1981) (Rehnquist, J., dissenting from denial of petition for writ of certiorari) (noting that the ADEA "provides that it shall not be unlawful for an employer to take any action otherwise prohibited 'where the differentiation is based on reasonable factors other than age'").

In view of the clear parallel between the EPA and the ADEA regarding exceptions to liability for conduct based on factors other than a protected characteristic, the decision below is inconsistent with this Court's ruling in *Gunther*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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IN THE
Supreme Court of the United States

UNITED AIRLINES, INC.,
Petitioner,

v.

LESLIE FRANK, *et al.*
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The petition presents two questions for this Court's review, both of which implicate a conflict among the federal circuits and the first of which involves an issue that this Court has unsuccessfully attempted to address on three occasions: (1) whether a judgment in a class action lacks binding effect either because the class members did not have an opportunity to opt out of the proceedings or because the facts underlying the judgment have changed in an immaterial way; and (2) whether the Age Discrimination in Employment Act ("ADEA") permits a disparate impact theory of liability. Respondents' two arguments for denying review of the first question are unpersuasive, as one rests on a basic misreading of the decision below and the other skips ahead to the ultimate merits and simply assumes (erroneously) that the decision is correct. Respondents fare no better on the second question, as they cannot – and do not – contest the deep conflict among the circuits on the availability of a disparate impact theory under the ADEA.

1. Respondents, a class of female flight attendants, seek recovery under Title VII in a challenge to the weight program formerly maintained by petitioner United Airlines, Inc., even though a previous action by a class of all present and future female flight attendants also challenging United's weight program under Title VII resulted in a judgment in United's favor – the "*ALPA* judgment." *See* Pet. 2-4. There is no dispute that the class of plaintiffs in the *ALPA* case encompasses the class of plaintiffs in this one.[1] The Ninth Circuit nonetheless refused to find that the *ALPA* judgment pre-

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[1] It is well established that a judgment in a class action can "bind future claimants, *i.e.*, those persons whose claims have not ripened at the time the judgment is entered but who subsequently come within the defined class." 18 James Wm. Moore et al., *Moore's Federal Practice* § 131.40[3][e][iii] (3d ed. 1997).

cludes this action, reasoning: first, that the class certified under Federal Rule of Civil Procedure 23(b)(2) in *ALPA* did not possess opt out rights and so cannot be precluded from bringing a subsequent class action under Rule 23(b)(3) seeking monetary damages; and second, that the weight policy was nominally revised following the *ALPA* judgment. Both of those justifications, as the petition explains, implicate a conflict among the circuits, and this Court has attempted to resolve the first one on three separate occasions, initially in *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994) (certiorari dismissed as improvidently granted). Respondents present two principal arguments for denying review of the Ninth Circuit's refusal to accord the *ALPA* judgment preclusive effect, neither of which is persuasive.

a. Respondents first contend that the Ninth Circuit found below that the plaintiffs in *ALPA* did not adequately represent the interests of the class in this case, and that the *ALPA* judgment thus cannot preclude this action. *See* Brief in Opposition ("Opp.") 10-11. It is of course well established that due process prohibits class members whose interests were not adequately represented in a prior proceeding from being bound by the judgment. *See Richards v. Jefferson County*, 517 U.S. 793 (1996); *Hansberry v. Lee*, 311 U.S. 32 (1940). Contrary to respondents' assertion, however, the Ninth Circuit simply made no finding of inadequate representation in respect to the *ALPA* judgment. In fact, the central error in the Ninth Circuit's reasoning – as the petition spells out – is precisely that it was *not* based on any conclusion that the class was inadequately represented in connection with the *ALPA* judgment, and turned instead on whether the class members had the right to opt out of the case. *See* Pet. 17-20.

The Ninth Circuit did touch on adequate representation in discussing the *separate* question of whether the *settlement* that followed entry of the *ALPA* judgment – as opposed to the judgment itself – could preclude the current suit. *See* Pet.

App. 11a-12a; Pet. 20-21 n.13. And it is that discussion of the settlement's preclusive effect on which respondents base their contention that the decision below makes a finding of inadequate representation. *See* Opp. 10-11. The preclusive effect of the settlement is not in issue here, however. In respect to the question that *is* in issue here – *viz.*, the preclusive effect of the *judgment* in ALPA – the Ninth Circuit did not purport to address the adequacy of representation. Indeed, respondents did not challenge the adequacy of the *ALPA* representation in the district court or the Ninth Circuit, and United thus has had no opportunity to comment on the subject. This case therefore squarely raises the question whether class members must be afforded an opt out opportunity in order for a judgment in a class action to preclude subsequent claims for monetary damages, *i.e.*, the question that this Court sought to address in *Ticor Title* and two subsequent cases and the question that divides the courts of appeals.[2]

b. Respondents next submit that this case does not present the *Ticor Title* question because the *ALPA* judgment involved a different weight program. *See* Opp. 11-12. But that reasoning simply presumes that the nominal revision to the weight program in 1980 deprives the *ALPA* judgment of any preclusive effect, an issue that is itself encompassed by the first question presented in the petition. *See* Pet. 21-26.

In particular, the Ninth Circuit refused to accord the *ALPA* judgment preclusive effect both because of the lack of opt out rights and because of the slight revision to the weight program. Respondents' argument simply assumes that the second reason is persuasive, and asserts on that basis that the

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[2] In the course of their discussion of adequate representation, respondents also appear to suggest that the notice provided to the class members in *ALPA* was insufficient to bind the class in this action. *See* Opp. at 9. The Ninth Circuit specifically declined to rest its preclusion ruling on notice considerations, however, focusing instead on the lack of an opt out privilege. *See* Pet. App. 10a-11a.

first reason – *i.e.*, the *Ticor Title* question – thus is not presented for this Court's review. As the petition elaborates, however, the nominal two-pound across-the-board adjustment to the weight program in 1980 should have no material bearing on the *ALPA* judgment's preclusive effect; and the Ninth Circuit's contrary conclusion conflicts with the decision of this Court in *Montana v. United States*, 440 U.S. 147 (1979), and with opinions of other circuit courts, most directly with the Fifth Circuit's decision in *EEOC v. American Airlines, Inc.*, 48 F.3d 164 (5th Cir. 1995). *See* Pet. 21-26.

Respondents note correctly that *Montana* and the other decisions cited in the petition address the subject in terms of issue preclusion rather than claim preclusion. *See* Opp. 14-15. But respondents identify no salient distinction between claim and issue preclusion in the circumstances of this case, and – as the court below explicitly recognized – there is none. To begin with, the tests for determining whether two cases involve the same claim for claim preclusion purposes or the same issue for issue preclusion purposes are similar. *See* Restatement (Second) of Judgments § 26, tit. E, intr. note (1982) ("There is a close relationship between the definition of a 'claim' and the sweep of the rule of issue preclusion."); 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4417 (1981) (tests articulated by Restatement for "delineating the issue on which litigation is . . . foreclosed by the prior judgment . . . approach very close to the classic tests for defining a cause of action for claim preclusion purposes") (internal quotation marks omitted). And under both claim and issue preclusion, an immaterial change in the controlling facts does not affect a judgment's preclusive effect. *See* Restatement, *supra*, § 24 cmt. f (stating that under claim preclusion, "*[m]aterial* operative facts occurring after the decision with respect to the same subject matter may . . . comprise a transaction which may be made the basis of a second action not precluded by the first") (emphasis added); *Montana*, 440 U.S. at 159 (issue preclusion applies

where no significant change in controlling facts).

More fundamentally, even if the adjustments to United's weight program in 1980 raise a question of issue preclusion rather than claim preclusion, that would be of no significance to whether this Court should grant review. The Ninth Circuit explicitly addressed United's issue preclusion argument and made clear below that its reasons for denying res judicata effect to the *ALPA* judgment apply fully to issue preclusion, *see* Pet. App. 13a, and United raised issue preclusion arguments in the district court, in the Ninth Circuit, and in its petition for certiorari, *see* Pet. 13 n.7.[3] As a result, regardless of whether one conceives of the preclusion question in terms of issue preclusion or claim preclusion, the Ninth Circuit's approach to the question whether the alteration to United's weight program deprives the *ALPA* judgment of binding effect is ripe for this Court's review.

The Ninth Circuit's reasoning on that issue cannot be squared with this Court's decision in *Montana* or with the approach of the other circuit courts. The decision below simply makes no effort to assess whether the two-pound adjustment to the weight program in 1980 amounts to a significant change under *Montana*, instead assuming that the mere fact of the adjustment – no matter how immaterial – automatically defeats preclusion, *see* Pet. App. 9a-10a, notwith-

[3] In the course of responding to United's issue preclusion arguments, the Ninth Circuit suggested that the arguments had been raised only in a footnote in United's brief. *See* Pet. App. 13a. Even if that were relevant, it is simply incorrect. United's brief in the Ninth Circuit clearly argued that issue preclusion principles barred the current action, *see* Br. of Deft.-Appellee United Airlines, Inc., *Frank v. United Airlines, Inc.*, No. 98-15638 (9th Cir. filed Oct. 9, 1998), at 41-42 & n.8, 43-44, citing this Court's decision in *Montana* and the Fifth Circuit's in *EEOC v. American Airlines, Inc.*, and stating unambiguously that even if "the two suits address different *claims*," the "subsequent suit may be barred if the dispositive issue is the same" as is true "[i]n the present case," *id.* at 44 (emphasis in original).

standing that the across-the-board adjustment in fact operated to *favor* the plaintiff class. The Ninth Circuit's approach to the nominal change in United's weight program firmly establishes that court as the jurisdiction of choice for plaintiffs throughout the country who desire a second chance to challenge the legality of policies already upheld by other courts. *See* Pet. 25-26.[4]

In short, *both* of the Ninth Circuit's asserted grounds for denying the *ALPA* judgment preclusive effect in this action – *viz.*, the lack of opt out rights (the *Ticor Title* ground), and the nominal change in the weight program (the *Montana* ground) – are encompassed by the first question presented in the petition, and both grounds merit this Court's review. That is particularly so given the substantial nationwide implications of the Ninth Circuit's preclusion ruling, which the petition elaborates in detail, *see* Pet. 15-17, 25-26, and which respondents do not dispute.

2. Respondents offer no serious argument against review of the second question presented by the petition: whether "disparate impact" claims are cognizable under the ADEA. Respondents do not deny the clear and persistent split in the circuits over that question, nor do they call into question the

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[4] As Judge O'Scannlain explained in his dissent, the "lockstep increases in maximum permissible weights . . . are no more material to the plaintiffs' cause of action than the possibility that the new policy was printed and circulated on a different color of paper." Pet. App. 25a-26a. Respondents suggest for the first time in their brief in opposition that demographic changes in the labor market between the time of the *ALPA* judgment in 1979 and the time of filing this suit present a further reason for denying the judgment preclusive effect. *See* Opp. 14-15. The Ninth Circuit relied solely on the two-pound adjustments in 1980, however, and respondents offer no support for the suggestion that subsequent demographic changes of the sort they identify can erase a judgment's binding effect. Such considerations seem more appropriately addressed through a collateral action seeking relief from the initial judgment based on changed factual circumstances. *See* Fed. R. Civ. P. 60(b).

importance of the issue for employers and employees nationwide. They raise only two points, both of which are unavailing.

a. First, respondents note that, unlike the policies at issue in the other cases implicated in the circuit split, the challenged program in this case "classifies employees on the basis of age." Opp. at 16. Respondents admit, however, that the way in which the program classifies employees by age is entirely irrelevant to their disparate impact claim. Indeed, the court of appeals affirmed the trial court's dismissal of respondent's disparate *treatment* claim, Pet. App. at 19a, and respondents take no issue with that ruling. To the contrary, respondents themselves insist that the challenged program *is* "facially neutral" with respect to age. Opp. at 16; *see id.* at 17 n.12 (noting "Respondents' allegation that the weight program's allowances for age were facially neutral but had a disparate impact on flight attendants over the age of 40"). The decision below thus squarely presents the ADEA/disparate impact question that has deeply divided the circuits: whether a policy neutral with respect to age nevertheless can be found to violate the ADEA solely because of an alleged disparate impact on older employees.

b. Respondents' only other objection to review of that question rests on the fact that the Ninth Circuit's order reversed the trial court's dismissal of the disparate impact age discrimination claim and remanded the claim for further proceedings. Respondents assert that there is thus no "final order" on the disparate impact claim and that the claim is "not ripe for review by this Court." Opp. at 17. In support of that contention, respondents rely exclusively (and mistakenly) on *Catlin v. United States*, 324 U.S. 229 (1945), a case addressing the appellate jurisdiction of the lower courts. This case, however, involves the certiorari jurisdiction of this Court under 28 U.S.C. § 1254(1), *see* Pet. at 1, which confers "unquestioned jurisdiction" on the Court to review orders of the

kind in issue here, Robert L. Stern et al., *Supreme Court Practice* 195 (7th ed. 1993).

This Court has frequently granted certiorari in such circumstances where there is an "important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari," *id.* at 196 (citing cases); *see, e.g., Seling v. Young*, 121 S. Ct. 727, 730 (2001); *Texas v. Lesage*, 528 U.S. 18, 20 (1999); *Olmstead v. Zimring*, 527 U.S. 581, 595 (1999), including where the issue of law was the standard for evaluating a disparate impact claim, *see Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 649 (1989) (granting certiorari to review standard for evaluating Title VII disparate impact claim despite court of appeals' remand to trial court for application of standard in further proceedings). Here, the disparate-impact claim could not be more fundamental to the further conduct of the case: the only question that remains to be litigated is whether United's policy has a disparate impact on older workers. And the fact that the merits of the ADEA disparate impact claim have not yet been resolved could hardly interfere with this Court's consideration of the question presented, which is whether such claims may be asserted at all. That is a pure question of law, the answer to which will not be made more clear by the expense of further proceedings. There is no reason the Court should not grant the writ now and decide conclusively whether, as a matter of law, the ADEA authorizes the disparate impact claim on which respondents seek to proceed.

CONCLUSION

For the foregoing reasons, as well as the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: February 13, 2001

(5)

No. 00-948

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October Term, 2000

UNITED AIR LINES, INC.,

Petitioner.

v.

LESLIE FRANK, ET AL.

Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE*, THE COUNCIL FOR EMPLOYMENT LAW EQUITY, IN SUPPORT OF THE PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.2(b) of this Court, the Council for Employment Law Equity ("CELE") by its undersigned counsel, hereby moves for leave to file its brief as an *amicus curiae* in support of Petitioner, United Airlines, Inc.* In support of its Motion, the CELE states:

The Council for Employment Law Equity ("CELE") is a non-profit coalition of major employers committed to the

* Prior to filing this Motion, the CELE sought the consent of all parties to the filing of its brief, as required by Rule 37.2 of this Court. The Petitioner consented to the CELE's request. The CELE received no response from Respondents to its requests, necessitating this Motion.

highest standards of fair, effective, and appropriate employment practices, and to the promotion of such employment practices in the employer community; before the judicial, legislative, and executive branches of government; and to the public at large.

The CELE believes that its *amicus curiae* participation will benefit the Court in this proceeding, as the organization and its members bring a unique perspective to the issues presented in this case. The CELE is a repository of extensive experience and resources on how current law, regulations, policies and practices impact the workplace. With the development and maintenance of a fair and productive workplace a primary goal, the CELE pays close attention to how the fallout of court decisions may impact this aim. Accordingly, the CELE and its members have an important perspective on the critical policy issues involved in this case.

WHEREFORE, the Council for Employment Law Equity respectfully requests that the Court grant its motion and permit it to file the accompanying brief as an *amicus curiae* in support of the Petitioner.

Respectfully submitted,

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No. 00-948

In The
Supreme Court of the United States
October Term, 2000

UNITED AIR LINES, INC.,
Petitioner.
v.
LESLIE FRANK, ET AL.
Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICUS CURIAE*, THE COUNCIL FOR EMPLOYMENT LAW EQUITY, IN SUPPORT OF THE PETITIONER

INTEREST OF THE *AMICUS*[1]

The Council for Employment Law Equity ("CELE") is a non-profit coalition of major employers committed to the highest standards of fair, effective, and appropriate employment practices, and to the promotion of such employment practices in the employer community; before the judicial, legislative, and executive branches of government; and to the public at large.

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[1] The CELE hereby certifies, in accordance with Rule 37.6 of this Court, that no counsel for a party authored this brief in whole or in part, and no person or entity, other than the CELE, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

The CELE has a significant interest in the questions presented in this case. By (a) refusing to enforce a judgment rendered in a prior class action suit and allowing the relitigation of the same issues involving the same parties in a subsequent class action, and (b) entertaining a disparate impact claim under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-624 ("ADEA"), the Ninth Circuit not only ignored established law, but also the enormous damage its decision will cause in the workplace.

If the Ninth Circuit's decision in this case stands, employers will be discouraged from deviating from the status quo, as doing so could alter the "nucleus of facts" common to the class action members and expose the employer to the risk and exposure of renewed litigation. The finding that an employer's *beneficial* changes to an employment policy triggered a change in facts sufficient to negate a prior judgment's preclusive effect will be a disincentive for other employers to implement, alter, or improve workplace policies and benefits. Furthermore, the Ninth Circuit's resultant failure to honor a court judgment – thereby subjecting an employer to duplicative litigation – jeopardizes the incentives to settle Rule 23(b)(2) class claims. Such consequences would be detrimental to both employers and employees.

The holding by the Ninth Circuit that the ADEA permits a disparate impact analysis would likewise impose unwarranted burdens on well-meaning employers. Many of the CELE's members – and countless other employers subject both to class action suits and the ADEA – have multi-state operations. The current split between the Courts of Appeals regarding whether the ADEA is subject to disparate impact analysis hinders employers' ability to create uniform employment policies. Therefore, a definitive resolution of these issues by this Court is necessary.

INTRODUCTION AND SUMMARY

The Ninth Circuit's refusal to honor a judgment in a prior class action suit where the class was adequately represented and properly certified under FED. R. CIV. P. 23(b)(2), and instead permit the relitigation of the same issues involving the same parties in a subsequent class action certified under Rule 23(b)(3), not only violates the principles of res judicata and collateral estoppel, but also threatens the integrity of the class action process itself. For employment class action litigation in particular, this decision, if upheld, will place employers in a lose-lose situation when faced with injunctive class action suits, and reduce the incentive to settle and make positive employment policy changes. Moreover, the Ninth Circuit's determination that disparate impact claims are cognizable under the ADEA runs contrary to the act's intent and public policy.

Petitioner United Airlines implemented a weight policy for all of its flight attendants in the early 1970s. Charging that this weight policy was unfairly implemented and thus discriminated against women in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e ("Title VII"), a group representing "all present and future female [United] flight attendants" filed an "injunctive" class action suit certified under Rule 23(b)(2).

The District Court upheld the validity of United's weight policy, but determined that the airline had enforced it in a discriminatory manner. The judgment entered on October 30, 1979 permitted United to continue using the weight policy, as long as it was implemented in accordance with Title VII. Subsequently, the parties entered into an agreement whereby United increased the weight limits for men, women, and older employees.

Nonetheless, in 1992 Respondents once again attacked the facial validity of the same weight policy in the Northern District of California. In addition to sex-based disparities

allegedly inherent in the policy itself, the Respondents claimed that the policy has a disparate impact on older employees in violation of the ADEA. This time, the class sought damages as their exclusive remedy, thereby garnering a Rule 23(b)(3) certification, which imposes stricter notice requirements, and gives members the opportunity to opt out of the class.

The District Court properly dismissed this new suit, holding that the Title VII claims were precluded by the prior judgment and that the ADEA does not provide for disparate impact analysis.[2] A divided panel of the Ninth Circuit reversed on both grounds. Among the reasons for finding that the plaintiff class was not precluded from relitigating the legality of the weight policy were a supposed change in controlling facts due to the adoption by United of more lenient standards, and the fact that a Rule 23(b)(2) suit differs from a Rule 23(b)(3) suit in that it does not permit class members to opt out, as required in a suit for damages. These justifications, as will be explained, not only defy common sense, but also public policy. If allowed to stand, this decision will have disastrous repercussions for class action suits in general, and employment policy in particular.

For these reasons, the CELE urges this Court to grant the petition for a writ of certiorari, and to reverse the decision of the Ninth Circuit.

ARGUMENT

I. The Decision In *Frank* Would Effectively Negate Two Prime Purposes Of Class Action Lawsuits: Efficiency And Avoidance Of Inconsistent Adjudications.

Class action litigation – rooted in English common law and incorporated into American jurisprudence by the mid-

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[2] The adequacy of the prior representation was not challenged by Respondents before the District Court or the Ninth Circuit.

1800s[3] – remains a necessary procedural device for adjudicating complex, multiparty claims. This Court has emphasized that the justifications for class action lawsuits include the need to protect the defendant from inconsistent obligations, protect the interest of absentees, provide a convenient and economical means for disposing of similar lawsuits, and facilitate the spreading of litigation costs among numerous litigants with similar claims. *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 423 (1980).[4]

The efficiency and finality goals of class action litigation are thoroughly intertwined. The aggregation of similar claims into one suit not only enables a large group of grievants – who otherwise may not have the financial resources to set forth individual claims – to have their claims heard,[5] but also prevents relitigation of the same claims. One final, binding adjudication of a class claim precludes the possibility of inconsistent decisions and clogged dockets.

These benefits conferred upon all parties are highly instrumental in the employment context. Class actions provide past and present employees with an efficient and cost-effective means of resolving similar claims. Class actions are particularly suited to address charges of discriminatory employment practices that affect a large number of employees. In return, employers need only

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[3] WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE Rule 23 § 1751 (2d ed. 1986).

[4] *See also Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, *reh'g denied*, 446 U.S. 947 (1980).

[5] *See, e.g.*, The Harvard Law Review Association, *Developments in the Law – The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions and Legislative Initiatives*, 113 HARV. L. REV. 1806, 1808 (May 2000) (class action seeks to enhance procedural fairness by ensuring that people who have been wrongly harmed have access to the judicial system).

defend against one suit and garner the certainty that a court-sanctioned policy or practice can thereafter be followed without exposure, absent a change of law or controlling fact.

The decision in *Frank v. United Airlines, Inc.*, 216 F.3d 849 (9th Cir. 2000), however, if upheld, would radically disrupt this balance of benefits. The fundamental rights of hundreds of thousands of past and future class action litigants – plaintiffs and defendants – are implicated.

A. *Frank* Would Encourage A Needless Proliferation Of Litigation, Including The Resurrection Of Countless Losing Party's Class Action Suits.

The Ninth Circuit's decision in *Frank* will no doubt lead to an onslaught of duplicative litigation. Essentially, a plaintiff could relitigate an entire case simply by requesting damages. Under *Frank*, a plaintiff's attorney who filed – and lost – a Rule 23(b)(2)[6] class action, can theoretically refile the same suit the next day by reclassifying the case as one for damages. This is not so in any Circuit which has faced this issue except the Ninth.[7] This holding will have disastrous repercussions.

For example, *Frank* will open a Pandora's box of employment discrimination suits for classes certified prior to 1991. The 1991 amendments[8] to the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, provided for the award of

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[6] Class actions certified under FED. R. CIV. P. 23(b)(2) typically are suits for injunctive relief. In the employment context, the class generally seeks relief in the form of a court-ordered change in an employment practice along with the equitable remedy of back pay. *See, e.g.*, Stephen Bough and Dirk Hubbard, *Issues in Employment Class Action Litigation*, 56 J. MO. BAR 37 (Jan./Feb. 2000).

[7] *See, e.g., Kyriazi v. Western Electric Co.*, 647 F.2d 388, 393 (3d Cir. 1981); *In re Agent Orange Product Liability Litigation*, 996 F.2d 1425 (2d Cir. 1993); *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973).

[8] Pub. L. 102-166.

compensatory and punitive damages in employment discrimination cases. Prior to 1991, an employee or class was precluded from seeking such damages. Thus, many employment class suits were certified under Rule 23(b)(2).

The practical effect of the *Frank* decision on this issue is that *all* significant class action suits certified under Rule 23(b)(2) *before* 1991 may now be relitigated as suits for damages. Previously settled and dormant class actions will be subject to relitigation on the same substantive issues whenever class counsel can bootstrap jurisdiction in the Ninth Circuit. Doing so exposes employers and other defendants – as well as the judicial system – to the type of relitigation "gaming table" atmosphere that prompted the banishment of the doctrine of mutuality of estoppel by this Court in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 330 (1971). The need to avoid this judicial redundancy is exactly why class actions were implemented in the first instance.[9]

B. The Inevitable Duplication Of Claims Will Completely Eliminate Rule 23's Protection Of Defendants From Inconsistent Obligations And Vitiate The Purpose Of The Rule.

Federal Rule 23 was devised to facilitate an expeditious and economical means of processing multi-party litigation. As part of this system, the preclusive effects of res judicata and collateral estoppel ensure that the parties are not subject to duplicative and inconsistent adjudications.[10]

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[9] *See, e.g.*, Edward F. Sherman, *Class Actions and Duplicative Litigation*, 62 IND. L. J. 507, 525 (Summer 1987). ("The raison d'être for a [Rule 23](b)(2) class – that injunctive relief is applicable to the class as a whole – would be undermined if duplicative suits could result in conflicting judgments).

[10] *See, e.g.*, James Wm. Moore ET AL., MOORE'S FEDERAL PRACTICE, § 23.02 (3d ed. 1999): "A class action provides a

Frank ignores the intent of the Rule. In *Frank*, an issue that was previously litigated in *Air Line Pilots Ass'n Int'l v. United Air Lines, Inc.*, 26 F.E.P. Cases 607 (E.D.N.Y. 1979) – the legality of United Airlines' use of a weight limit policy – was resurrected with impunity in the subsequent lawsuit. The Ninth Circuit denied the preclusive effect of the prior action, even though the case involved the same issue, defendant, and plaintiff class. Thus, the Ninth Circuit subjected United Airlines' vindicated policy to renewed facial attack, turning the principles of claim and issue preclusion on their heads.

The Ninth Circuit attempted to distinguish *Frank* from *Montana v. United States*, 440 U.S. 147, 153 (1979), which held that an issue "actually and necessarily determined" by a court is "conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation," by claiming that the notice requirements of the prior Rule 23(b)(2) action failed to meet the more stringent notice and opt out requirements imposed by Rule 23(b)(3). Because of this asserted lack of opt out rights for all potential class members, the Ninth Circuit reasoned that it need not honor the prior judgment. However, this reasoning ignores the purpose behind the more stringent notice and opt-out requirements of 23(b)(3) certification. Rule 23(b)(3) was designed to address situations in which individual members of a class, although affected by some common wrong, experience particularized damages, and therefore are afforded the opportunity to "opt out" of the class and pursue their own lawsuits. Rule 23(b)(3) class members are often "loosely associated by common questions of law or fact, rather than

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single proceeding in which to determine the merits of the plaintiffs' claims, and therefore protects the defendant from inconsistent adjudications." *See also Geraghty*, 445 U.S. at 402-403 (the justifications that led to the development of class actions include the protection of the defendant from inconsistent claims).

by any pre-existing or continuing legal relationship," and therefore are in need of greater due process protection. WRIGHT & MILLER, § 1786, at 194. In contrast, because the Rule 23(b)(2) class is more cohesive, it is less likely that there will be special defenses or issues relating to individual members. *See Id.* at 195. Thus, the class is not provided with opt out rights, in part because any damages incurred are outweighed by the broader injunctive remedy, but also, logically, because greater commonality helps ensure adequate representation of all class members and justifies less than maximum due process protections for absent class members.

For example, a mass tort case involving a defective product derives from a common wrong (faulty product) but results in particularized damages among the plaintiff class members. A Rule 23(b)(3) certification is warranted to ensure that individuals with particularized damages are afforded their day in court. In contrast, a broad, uniformly-applied employment policy is best addressed via an injunctive class action suit, since the harm incurred is likely uniform in kind, if not degree, across the plaintiff class.

Granted, there will be members of a Rule 23(b)(2) class who believe their claims are unique, and thus warrant the opportunity for individualized suit. However, the very representative nature of class actions mandates that some individual claims be subjugated to that of the class. The class action was designed as an exception to the usual rule that litigation is conducted by and on behalf of the individually named parties only. *See Califano v. Yamasaki*, 442 U.S. 682, 700-701 (1979); *In re A.H. Robbins Co., Inc.*, 880 F.2d 709 (4th Cir. 1989), *cert. denied*, 493 U.S. 959. Therefore, that all members of the 23(b)(2) class in *Frank* were not necessarily notified pursuant to Rule 23(b)(3)[11] and not given

[11] It should be noted that the notice of the 23(b)(2) class action in this case met the more stringent requirements of a Rule 23(b)(3) "damages" class certification.

a chance to opt out is inapposite for determining the judgment's preclusive effect. The substantive issue decided (the legality of the employment policy) is an issue that affects the class uniformly, does not raise the same due process concerns anticipated by a typical Rule 23(b)(3) case, and was adequately adjudicated as an injunctive class suit. Allowing *Frank* to stand will therefore gut Rule 23(b)(2)'s purpose.

C. Equivalent Procedural Protections Satisfy Rule 23 Standards.

The injunctive class in *ALPA* was provided with ample procedural protections typical of properly administered Rule 23(b)(2) class actions. In fact, the plaintiff class in *Frank* does *not* challenge the validity of the prior 23(b)(2) certification or the adequacy of the prior class representation. It stands to reason that unless the prior action was somehow inherently unfair, the class members were adequately represented and thus bound by the prior judgment.

In *Stewart v. Rubin*, 948 F. Supp. 1077 (D.D.C. 1996), for example, the court ruled that even though an employee was not permitted to opt out of a class in a racial discrimination case, she was nonetheless bound to the settlement reached in the action, since the requirements of due process and fundamental fairness had been satisfied. In determining that the process was fair, the court noted that she had been adequately represented by the named plaintiffs and by a capable and experienced class counsel.[12] So, too, were the members of the 23(b)(2) class in *Frank*.

Additionally, that the plaintiffs now seek monetary damages is irrelevant to the underlying fairness issue. The

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[12] The adequacy of representation has been a critical factor in determining the preclusive effect of a class judgment. *See, e.g., Hansberry v. Lee*, 311 U.S. 32 (1940); *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989); *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 691 (1961).

heightened concerns that drive the policy behind the "opt out" requirement of Rule 23(b)(3) do not rise to a constitutional level merely because money damages are implicated if a class has previously been properly certified under Rule 23(b)(2).[13] Although Rule 23(b)(2) cases are primarily suits for declaratory and injunctive relief applicable to the class as a whole, "it is not uncommon in employment discrimination cases for the class also to seek monetary relief in the form of back pay or front pay." *Eubanks v. Billington*, 110 F.3d 87 (D.C. Cir. 1997). Courts generally allow Rule 23(b)(2) classes to recover monetary relief in addition to declaratory injunctive relief, at least where the monetary relief does not predominate. *See Prove v. State Teachers' Retirement System*, 780 F.2d 776, 780 (9th Cir.), *cert. denied*, 476 U.S. 1170 (1986); *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1152 (11th Cir. 1983); *Alexander v. Aero Lodge No. 735*, 565 F.2d 1364, 1372 (6th Cir. 1977), *cert. denied*, 436 U.S. 946 (1978); WRIGHT & MILLER at § 1775; JAMES WM. MOORE, ET AL. at § 23.40[4].

In *Frank*, since the issue was United's employment policy as a whole, a Rule 23(b)(2) certified class was appropriate, and fairly executed. Therefore, the original judgment regarding the validity of that policy should stand. The decision of the Ninth Circuit, to the contrary, is at odds with the requirements of Rule 23, and should be overturned.

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[13] For example, in cases involving so-called "hybrid" actions, other courts have consistently held that opt-out rights are not required but may be permitted by the court under the provisions of Rule 23(d). *See, e.g.*, James Wm. Moore ET AL., at § 23.43[6][b] and cases cited therein.

II. The Resultant Increase In Duplicative Litigation Will Exacerbate An Already Backlogged Court System.

A. Lack Of Inducement To Settle Will Needlessly Prolong Litigation.

Frank not only jeopardizes the preclusive effect of prior judgments, but also the finality of settlements and consent decrees. Although only the prior court's *judgment* was at issue in *Frank*, since the parties' post-judgment agreement to implement United's revised policy was never submitted to the court for formal approval, the reasoning in *Frank* would apply with equal force to consent decrees.

The enforceability of a valid consent decree as equal to that of a court judgment is well established. It has been noted that as long as there is sufficient notice and representation, "there are few instances in which a class action defendant should not receive the full benefit of the doctrine of res judicata whether based upon trial on the merits or settlement." *Valerio v. Boise Cascade Corp.*, 80 F.R.D. 626, *aff'd*, 645 F.2d 699, *cert. denied*, 454 U.S. 1126 (1981). Additionally, § 108 of the Civil Rights Act of 1991,[14] codified at 42 U.S.C. § 2000e-2(n), shields valid consent decrees from collateral attack. *Frank*, however, renders consent decrees entered pursuant to Rule 23(b)(2) class actions vulnerable. Consequently, *Frank*, if let stand, will contravene the purpose behind 42 U.S.C. § 2000e-2(n) of fostering settlement and will discourage mutually agreeable solutions – consent decrees being only one such example – to class action litigation.

There are a number of benefits to resolving employment-related charges at the outset. First and foremost, both parties save a great deal of time and money by foregoing often protracted and invariably expensive litigation. Second, early disposition of claims – especially through cooperative

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[14] Pub. L. 102-166.

alternative dispute resolution methods – helps to preserve the post-lawsuit employment relationship. Finally, early settlements often involve consent decrees in which employers agree to implement beneficial workplace changes.

It is not surprising, therefore, that the Civil Rights Act of 1991 encourages such pretrial resolutions. Section 118 of Pub.L. 102-166 promotes the use of alternative dispute resolution methods such as settlements, negotiations, conciliation, fact finding, and arbitration.

Most parties have taken heed. Between 1990 and 1998, out-of-court settlements rose from 31 percent to 35 percent.[15] Voluntary dismissals increased from 8 percent to 13 percent during the same time period. Proceeding to trial is significantly less common. The percentage of employment-related cases that were resolved via verdict or some other form of judgment for either of the parties had actually *decreased* from 9 percent in 1990 to 5 percent in 1998.[16]

If *Frank* is upheld, this trend will likely reverse. The loss of a 23(b)(2) settlement's binding effect would eliminate any inducement to partake in such pretrial resolution methods. Employers, as the defendants to employee class actions, would be disinclined to settle – to the disadvantage of both parties and the judicial system at large – because it would be senseless to pay money to make a problem go away if the solution is merely temporary. In order to concede some degree of culpability, employers need a fair assurance that not only will all members be bound by the resolution, but that the resolution of the claim itself will endure.

Because of the uncertainty inherent in *Frank*, cases formerly prone to settlement will instead proceed to trial. Such a result clearly runs contrary to public policy.

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[15] Marika F.X. Litras, "Civil Rights Complaints in U.S. District Court, 1990-98," (NCJ-173427).
[16] *Id.*

B. The Burdens On Our Overtaxed Court Systems Would Grow.

The predicted reduction in settlements and relitigation of recertified class action suits will no doubt further hamstring the judicial system's ability to process employment discrimination claims. Class action suits ordinarily resolved through early settlement or voluntary dismissal would instead proceed to fully litigated conclusions – a time-consuming and financially burdensome process.

The economies of scale generated by class action suits ordinarily confer cost and time savings on the judicial system. Class actions "improve judicial efficiency by aggregating a multitude of individual claims . . . eliminate or reduce the threat of repetitive litigation," and thus "[free] the court system to adjudicate more claims with less delay."[17]

Despite this efficiency, a recent increase in class action litigation has imposed new costs for employers and new burdens for the courts.[18] According to a recent study of class actions put forward by the RAND Institute for Civil Justice, federal judges spend about five times as many hours on class actions as on "average" civil cases.[19] If *Frank* stands and proliferates, the increase in class action suits will further clog an already over-loaded employment litigation docket.

In Fiscal Year 1999, the reported number of employment discrimination charges filed with the EEOC totaled 77,444.[20] Private employment suits also grew at an astronomical rate.

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[17] 113 HARV. L. REV. at 1808.

[18] RAND INSTITUTE FOR CIVIL JUSTICE: *Class Action Dilemmas, Pursuing Public Goals for Private Gain* (Nov. 1, 1999).

[19] *See* Thomas Willging, Laurel Hooper, and Robert Niemic, *Empirical Study of Class Actions in Four Federal District Courts*, Washington, D.C.: FEDERAL JUDICIAL CENTER, 1996.

[20] EEOC Charge Statistics, as published and available at http://www.eeoc.gov/stats/charges.html.

In January of the year 2000, the Bureau of Justice Statistics published a study showing that from 1990 through 1998, private employment-related civil rights cases nearly tripled.[21] Private employment-related complaints accounted for approximately 65 percent of the overall increase in cases that have flooded the U.S. District Courts in this period.[22]

Employment-related class action suits have likewise increased. Between 1996 and 1998, the number of civil rights class action suits increased from 213 to 265.[23] With the outcome of *Frank* encouraging the relitigation of most claims, these numbers will continue to escalate.[24]

III. Employers Are Left With No Incentive To Make Changes Beneficial To Employees.

In *Frank*, one of the purported rationales for relitigating the issues was that "the two suits did not arise from the same transactional nucleus of facts." *Frank*, 216 F.3d at 851. This "change" in facts, however, was merely the employer's implementation of a more lenient weight policy. In other words, because the employer voluntarily relaxed its weight policy requirements, the Ninth Circuit determined that the interests of the class had sufficiently changed to bar any preclusive effect of the prior suit. Not only is this conclusion nonsensical, but also detrimental to employees as a whole.

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[21] Marika F.X. Litras, "Civil Rights Complaints in U.S. District Court, 1990-98," (NCJ-173427). Employment discrimination cases increased from 8,413 filings in 1990 to 23,735 in 1998.

[22] *Id.*

[23] *Id.*

[24] The optimum strategy for plaintiff's counsel in the post-*Frank* landscape will be to file a Rule 23(b)(2) action first. If the class loses, *Frank* grants an automatic second bite at the apple under Rule 23(b)(3); if the class wins, it can use issue preclusion *against* the employer to ensure a victory in a second action for compensatory and punitive damages. Either way, the number of cases doubles.

Faced with the prospect of duplicative litigation, employers have little incentive to update, improve, eliminate, or alter their employment policies in any way. For instance, an employer that liberalizes its employee leave policy or increases health benefits would be triggering a "change" in employment conditions, thereby subjecting itself to the possibility of new litigation. It follows, therefore, that short of a judicial or legislative mandate, employers will maintain the status quo – to the detriment of all parties involved.

For these reasons, this Court must reevaluate the Ninth Circuit's decision. If permitted to stand, *Frank* would dramatically alter the employment class action landscape.

IV. Permitting A Disparate Impact Analysis Of ADEA Claims Contravenes Legislative Intent And Would Significantly Harm Well-Meaning Employers.

A. Nothing In The ADEA's Text, Legislative History, Or Subsequent Amendments Opens The Act To Disparate Impact Analysis.

Age – unlike sex, race, nationality or disability – is a unique legally protected category in that *all* employees will conceivably become a member of the protected class at some point in their careers. Therefore, the statutory protections conferred upon this class differ from those provided to classes protected under Title VII.

The legislative history of the ADEA reflects this difference. A study conducted by the Secretary of Labor on the causes and effects of age discrimination,[25] which served as the impetus for the ADEA, made a point of distinguishing between "arbitrary" age discrimination and other employment policies and actions that may disproportionately affect older employees, recommending that only the former

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[25] THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT (1965) ("The Report"), mandated by Pub. L. No. 88-352, § 715, 78 Stat. 265 (1964).

be prohibited.[26] *See also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) ("[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA").

Additionally, the language of the ADEA also distinguishes age discrimination from Title VII-prohibited discrimination. Under the ADEA, it is unlawful for an employer:

> to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.[27]

This general prohibition is qualified by § 623(f)(1): "[i]t shall not be unlawful for an employer . . . to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). This passage permits an employer to use factors other than age as rationales for adverse employment actions that differentially impact individuals protected under the ADEA. Read with the ADEA's general prohibition against age-based discrimination, it follows that: it shall be unlawful to "discriminate against any individual . . . because of such individual's age," except when "based on . . . factors other than age." If § 623(f)(1) were not intended to exclude a disparate impact claim, then this section would stand for the circular proposition that "only age discrimination is age discrimination."[28]

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[26] The Report at 21-25.

[27] 29 U.S.C. §623(a)(1).

[28] *See also Markham v. Geller*, 451 U.S. 945, 947 (1981) (Rehnquist, J., dissenting from denial of cert.) (interpreting 29 U.S.C. § 623(f)(1) as denying an ADEA disparate impact analysis); *Ellis v. United Airlines, Inc.*, 73 F.3d 999 (10th Cir. 1996) (same); *EEOC v. Francis W. Parker School*, 41 F.3d 1073

Moreover, the fact that the Civil Rights Act of 1991 amended Title VII by explicitly providing for causes of action based upon disparate impact,[29] but did not do the same when it simultaneously amended the ADEA,[30] further supports the idea that Congress did not envision such age-based disparate impact claims.

The First, Seventh, and Tenth Circuits have already come to this conclusion.[31] This Court, in addition to the Third, Sixth, and Eleventh Circuits, has expressed in *dicta* that the ADEA likely does not permit disparate impact analysis. *See, e.g., Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993); *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719 (3d Cir. 1995); *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042 (6th Cir. 1998); *Broaddus v. Florida Power Corp.*, 145 F.3d 1283 (11th Cir. 1998). The Second, Eighth and Ninth Circuits, however, have disregarded this Court's analysis of § 623(f)(1) of the ADEA in *Hazen Paper*, and have instead permitted disparate impact claims to proceed. *See, e.g., Smith v. Xerox Corp.*, 196 F.3d 358 (2d Cir. 1999); *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948 (8th Cir. 1999).

This Circuit split will continue to plague multi-jurisdiction employers until this Court resolves the issue. Most large companies conduct operations across judicial circuits. Absent a uniform decision as to whether the ADEA permits a claim for disparate impact, employers will be subject to inconsistent precedent. Inconsistent applications of the ADEA prevent an employer from implementing uniform policies and practices, and encourage forum shopping by plaintiffs.

(7th Cir. 1994) (same); *Mullin v. Raytheon Co.*, 164 F.3d 696 (1st Cir.), *cert. denied*, 120 S.Ct. 44 (1999) (same).

[29] Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074-75 (1991).

[30] *See, e.g., Id.* at § 115; 105 Stat. at 1079.

[31] *See, e.g., supra* note 28.

B. Non-Discriminatory Employers Will Be Unjustly Penalized.

Additionally, recognizing a claim for disparate impact under the ADEA would routinely impose unjustified liability on employers. Older workers represent a significant percentage of the labor force. This is due in large part to the participation of the "baby boom" cohort (individuals born in the United States between 1946 and 1964). Currently, there are more than 83 million baby boomers in this country.[32] When this cohort entered the workforce, they increased the size and median age of the labor market.

According to a study conducted by the Bureau of Labor Statistics, by the year 2005, the number of workers age 45 and older will total approximately 55 million, equaling about 37 percent of the labor force.[33] These statistics reflect an increase from 1995, when it is estimated there were about 41 million workers age 45 and older, representing approximately 31 percent of the labor force.[34] By 2005, the median age of the workforce is predicted to reach 41 years of age.[35]

The practical effect of this "graying" of the workforce for employers is that a typical work site already is or soon will be populated by a *majority* of employees protected by the ADEA. Almost any management decision, including revisions of policies, terminations, and hiring choices, is bound to impact this older population simply by virtue of its size. Thus, effectively any employment action – such as a

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[32] Stacy Poulos and Demetra Smith Nightingale, *The Aging Baby Boom: Implications for Employment and Training Programs*, URBAN INSTITUTE, prepared for the U.S. Department of Labor, Employment and Training Administration, under Contract No. F-5532-5-00-80-30.

[33] *See* Howard N. Fullerton, *The 2005 Labor Force: Growing, But Slowly*, MONTHLY LABOR REVIEW (Nov. 1995).

[34] *Id.*

[35] *Id.*

reduction-in-force, change in benefit plan, or implementation of stricter hiring standards – would be subject to disparate impact scrutiny. It follows that almost every employment action would be susceptible to litigation. Employers would be put in the unfortunate position of having to justify how their facially neutral, *non-discriminatory* decisions, which may incidentally impact employees 40 years and older, are necessary to the operation of their businesses.

While it is imperative that employers be held accountable for management decisions that intentionally discriminate against older workers, it is equally important that they *not* be unjustly punished for nondiscriminatory actions that may incidentally impact older employees. Doing so would impose undue burdens on employers, and would also burden the courts with potentially frivolous litigation. Legislative history points to the fact that disparate impact claims were never intended to be cognizable under the ADEA, and allowing employees to bring such claims invites abuse.

CONCLUSION

The Council for Employment Law Equity respectfully urges this Court to grant the writ of certiorari to review the judgment below, to reverse the ruling that would permit the class of United Airlines flight attendants to relitigate their claims, and to recognize that the ADEA does not provide for disparate impact analysis.

Respectfully submitted,

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